Stare Decisis is Cognitive Error

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I. INTRODUCTION .......................................................... 2

II. ARGUMENTS FOR STARE DECISIS ................................ 8
A. BURKEAN TRADITIONALISM ......................................... 11
B. STABILITY, PREDICTABILITY, EFFICIENCY ..................... 14
C. JUDICIAL LEGITIMACY .............................................. 17
D. CONCLUSION ............................................................ 18

III. COGNITIVE BIASES THAT UNDERCUT ARGUMENTS FOR STARE DECISIS .............................................. 19
A. CHOICE BIASES .......................................................... 20
   1. Cascades .............................................................. 21
   2. Status Quo Bias ..................................................... 23
   3. Endowment Effect .................................................. 25
   4. Framing Effect ...................................................... 26
   5. Path Dependence .................................................. 27
   6. Sticky Defaults ..................................................... 29
B. ATTITUDES AND MOTIVES ......................................... 31
   1. System Justification Theory ....................................... 31
   2. Motive to Simplify ................................................ 33
   3. Motive to Cohere .................................................. 34
C. STARE DECISIS IS COGNITIVE ERROR ......................... 35

IV. SOME PREDICTIONS, AND IMPLICATIONS FOR LAW AND LEGAL THEORY ................................. 39
A. PREDICTING BIAS ..................................................... 39
   1. Testing the Prediction I: Section 304 of Sarbanes-Oxley ...... 42
   2. Testing the Prediction II: The First and Fourth Amendments .. 48
   3. Testing the Prediction III: The Global War on Terror .......... 57
B. TRUTH OR STABILITY? .............................................. 62
C. PROBLEMS IN BOTH CASES, AND SOME SOLUTIONS .......... 63
   1. The Strong Case .................................................... 64
   2. The Middle Case ................................................... 65
   3. The Weaker Case ................................................... 65
D. AN IMPORTANT QUALIFICATION .................................. 66
E. WILL THE WORLD COME TO AN END? (NO.) ..................... 67

V. CONCLUSION: A WAY OUT ........................................... 73

Abstract

For hundreds of years, the practice of stare decisis -- a court’s adherence to prior decisions in similar cases -- has guided the common law. However, recent behavioral evidence suggests that stare decisis, far from enacting society’s “true preferences” with regard to law and policy, may reflect -- and exacerbate -- our cognitive biases.

The data show that humans are subconsciously primed (among other things) to prefer the status quo, to overvalue existing defaults, to follow others’ decisions, and to stick to the well-worn path. We have strong motives to justify existing legal, political, and social systems; to come up with simple explanations for observed phenomena; and to construct coherent narratives for the world around us. Taken together, these and other characteristics suggest that we value precedent not because it is desirable but merely because it exists. Three case studies -- analyzing federal district court cases, U.S. Supreme Court cases, and development of American policy on torture -- suggest that the theory of stare decisis as a heuristic has substantial explanatory power. In its strongest form, this hypothesis challenges the foundation of common law systems.

* * *

"[A]fter [courts] have proceeded a while they get their own set of precedents, and precedents save ‘the intolerable labor of thought,’ and they fall into grooves, just as judges do. When they get into grooves, then God save you to get them out of the grooves."

—Learned Hand

“We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages."

—Edmund Burke

I. INTRODUCTION

A hundred and fifty years ago, Tocqueville wrote that the greatest outrage to an Anglo-American lawyer was accusing him of having an
original thought. If one characterized the lawyer as being an innovator, “he will be prepared to go to absurd lengths rather than to admit himself guilty of so great a crime.” The common law system and its reliance on precedent, he wrote, forced lawyers to argue as though all of the rationale for their client’s position was compelled by pre-existing case law. Tocqueville was “surprised to hear [the common lawyer] quoting the opinions of others so often and saying so little about his own.” Conversely, a lawyer in the civil law system would “deal with no matter, however trivial, without . . . carry[ing] the argument right back to the constituent principles of the laws . . . .”

Change comes slowly to the common lawyer. He “values laws not because they are good but because they are old,” and if the law must be changed in some respect, “he has recourse to the most incredible subtleties in order to persuade himself that in adding something to the work of his fathers he has only developed their thought and completed their work.” Innovation is anathema to him.

Recent social psychological evidence suggests that Tocqueville was on to something -- about all of us, not just those of us trained in the common law. Across a wide range of contexts, the data provide compelling evidence of humans’ tendencies to prefer existing social systems and status quo endowments and a simultaneous subconscious “priming” to justify those existing defaults. If this is true, then the Anglo-American legal system, with its emphasis on stare decisis and adherence to precedent, exacerbates this human shortcoming.

Thence arises the title of this Article. Relying on precedent might be a good idea, or it might not. But it is clear that, rather than reflecting our “true preferences,” the theory and practice of stare decisis are at least partially rooted in our cognitive biases. There are two ways this could be the case. First, the practice of stare decisis may have evolved merely as a reflection of cognitive bias, and nothing more. This is the strongest, and most provocative, version of my argument. Second, the current practice of stare decisis may be yielding judicial decisions that are at least partially the product of heuristic judgments, resulting in socially-suboptimal results.

3 Alexis de Tocqueville, Democracy in America 268 (George Lawrence trans., J.P. Mayer ed. 1969).
4 Id. at 267.
5 Id.
6 Id. at 268.
I use the term “precedent” very broadly here. Legal doctrine may expand or limit the role of precedent in various contexts. However, as Frederick Schauer points out in his seminal article:

Appeals to precedent do not reside exclusively in courts of law. Forms of argument that may be concentrated in the legal system are rarely isolated there, and the argument from precedent is a prime example of the nonexclusivity of what used to be called “legal reasoning.” Think of the child who insists that he should not have to wear short pants to school because his older brother was allowed to wear long pants when he was seven. Or think of the bureaucrat who responds to the supplicant for special consideration by saying that “we’ve never done it that way before.” In countless instances, out of law as well as in, the fact that something was done before provides, by itself, a reason for doing it that way again.

Reliance on precedent is part of life in general.

I use this broad conception of precedent in this Article -- one that we humans use on a regular basis and one that affects almost every mode of legal analysis. This does not mean that reliance on precedent will produce bad results. It does mean that we should be skeptical of legal rules that become entrenched merely by virtue of their longevity. As Oliver Wendell Holmes, Jr. wrote in his seminal article,

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

A century earlier, Thomas Jefferson espoused a similar view. Requiring one generation to live under a Constitution set out by its predecessor, he wrote, was like “requir[ing] a man to still wear the coat which fitted him when a boy.” To right this perceived wrong, he suggested that the constitution should contain a mechanism for its own renewal:

Let us provide in our constitution for its revision at stated periods.

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7 See, e.g., infra notes 28 - 30 and accompanying text.
9 Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457 (1897).
10 Jefferson, supra note 11, at 41.
opportunity of doing this every nineteen or twenty years should be provided by the constitution, so that it may be handed on with periodical repairs from generation to generation . . . .

In this sense, Jefferson’s ideas were anti-Burkean. Edmund Burke, the father of modern conservatism, implored men to trade on the “general bank and capital of nations, and of ages,” and to distrust their own “private stock of reason.” Jefferson disagreed: “Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness . . . .”

Yet the common law system does not allow each court, or even each generation to “choose for itself” that which “it believes most promotive of its own happiness.” In that sense, our system is more Burkean than Jeffersonian. In the American system, if an issue under consideration has been directly decided by the Supreme Court, lower courts are bound to reach the same result, “unless and until [the Supreme] Court reinterprets the binding precedent.” A lower court cannot disregard the rule merely because it thinks an alternative would be “most promotive of [the current generation’s] happiness.” It cannot even disregard the legal rule if “the grounds upon which it was laid down have vanished long since.” As the Supreme Court has explained, “if a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”

Judges are thus obliged to answer the same question in the same way as others have answered it earlier, even if they would prefer to answer it differently.

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11 Letter from Thomas Jefferson to Samuel Kercheval, June 12, 1816, in ANDREW A. LIPSCOMB & ALBERT E. BERGH, 15 THE WRITINGS OF THOMAS JEFFERSON 42 (1904). Jefferson did not arrive at the time frame by accident. The mortality tables of his day suggested that the majority of adults living in a given generation would be dead within nineteen years. Id. This gives rise to the shorthand formulation, that Jefferson believed that the constitution should be rewritten every generation.
12 BURKE, supra note 2, at 183.
13 Jefferson, supra note 11, at 41.
15 Holmes, supra note 9.
And so Jefferson and Holmes have not been heeded. Despite their protestations, we are old men wearing boys’ coats, abiding rules laid down in the time of Henry IV.  

However, there is more to this story. The provocative title notwithstanding, the thesis of this Article is not (only) that stare decisis is cognitive error. I want to draw further conclusions about the implications of cognitive bias for the common law system. Over the years, evidence from social psychology has made increasingly clear that humans’ actions do not conform to the “rational actor model,” as had been supposed, implicitly or explicitly, by economic and legal theory for decades. Evidence in the behavioral literature suggests that we humans tend to overvalue existing, historical, and traditional arrangements. Our cognitive biases are correlated, and they all suggest an undue reliance on the past. This ought to be of concern to lawyers, because the cornerstone of our legal system is reliance on prior decisions.

There are three possibilities. First, our common law system, and stare decisis, might be nothing more than reflections of a constellation of correlated cognitive biases. If this is true, then we are substantially worse off for relying on precedent, in all cases and at all levels, than we would be in a system where each case was approached with a blank slate. Second, in the weaker version of the argument, reliance on precedent might generally be desirable. However, in close cases, judges should not rely on precedent, absent special justification, because they might be relying on precedent as a heuristic -- a cognitive shortcut -- and not because it yields the desirable result. Third and last, in the weakest version of the story, the psychological phenomena would be something worth nothing, but nothing that should lead to doctrinal change. Awareness of bias may become one factor among many in deciding whether a court should refuse to follow precedent. In this weakest version, the argument in this article would likely have little role to play in the context of “vertical stare decisis,” but some role in the context of “horizontal stare decisis.”

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18 This may actually understatement the problem somewhat. King Henry IV ruled from 1589 to 1610. See JOHN P. MCKAY, ET AL., A HISTORY OF WORLD SOCIETIES, VOL. 2 466 (8th ed. 2008). Meanwhile, several United States jurisdictions still adhere, at least in part, to the Rule in Shelly’s Case, which actually predates the time of Henry IV. See Shelley’s Case, 1 Co. Rep. 93b (1581). Cf. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 298-99 (5th ed. 2002) (describing the rule); id. at 300 (noting that the rule still applies in Arkansas and to pre-abolition wills in jurisdictions that have abolished the rule non-retroactively, including Ohio, Illinois, and North Carolina).

19 Vertical stare decisis refers to the obligation of a lower court to follow the binding precedent set by a higher court in its jurisdiction. Horizontal stare decisis refers to the
This is not the first paper to explore the implications of behavioral phenomena on the law. Nonetheless, it fills a gap in the existing literature in at least three ways. First, it builds on the extensive literature that has explained, in general terms, how insights from social psychology can and should change our understanding of legal theory. Second, it continues the tradition of authors like Cass Sunstein (on information cascades), Lawrence Lessig (on social norms), and Adrian Vermeule (on group decision making), who explore the implications of specific psychological findings on the law. Third, the article expands on work of authors have focused on discrete psychological phenomena and written about them in the context of specific legal doctrines: the stickiness of default rules in contract law; the endowment effect with regard to injunctions; reimagining tort law or corporate law in light of social psychology; and so on.

The literature has thus far focused on broad questions of legal theory (by authors like Hanson) or on specific phenomena and doctrines (by Sunstein, Lessig, Vermeule, and others). This Article, focusing on the process of legal reasoning, is situated at the niche between broader questions of legal theory and more specific doctrinal questions.

This article has three main parts. In the first part, I survey arguments for stare decisis. These arguments sound one (or more) of three themes:


20 Jon Hanson and his co-authors have been most prolific in this regard. The tandem articles The Situation and The Situational Character were groundbreaking articles that displaced the rational actor model with the “situational” model, informed by insights from social psychology. Hanson’s more recent three-part project explains how situational insights explain recent trends in the development of legal doctrine and legal theory.


stare decisis (1) is more likely to lead to correct results; (2) is stable, predictable, and efficient, and (3) enhances the legitimacy of the courts.

In the next Part, I catalogue various psychological phenomena that undercut arguments for stare decisis: we humans have a tendency to prefer the status quo (status quo bias); to overvalue existing entitlements (endowment effect); to make decisions based on others’ choices (information cascades); and more. In addition, we are motivated to seek reasons for our choices that support existing legal, political, and social systems (system justification theory); to create coherent patterns from past occurrences (motive to cohere); and to develop simple explanations for observed phenomena (motive to simplify). Taken together, these phenomena cast significant doubt on arguments for stare decisis.

In Part IV, the heart of the Article, I describe three case studies that support my hypothesis. First, I make a series of predictions regarding when a court’s decision is more likely to reflect heuristic judgments rather than cogent reasoning. I examine court cases analyzing whether there is an implied private right of action under Section 304 of the Sarbanes-Oxley Act, and conclude that the evolution of this legal rule over the past several years strongly suggests that the decisions reflect cognitive bias. In the second case study, I summarize Anuj Desai’s recent articles regarding the Court’s jurisprudence on certain First and Fourth Amendment doctrines to argue that this line of cases reflects the Supreme Court’s reliance on precedent as a heuristic. Third, I find evidence of cognitive bias in the recent (and still-unfolding) series of developments with regard to the debate over the definition of torture and the detainees at Guantanamo Bay, Cuba. The Global War on Terror has led the American legal system into uncharted territory. In this situation, if anywhere, one might expect courts and policymakers to approach the questions presented with a clean slate. I will attempt to show that their unwillingness (or inability) to do so suggests a reliance on precedent, not for its informational value, but because of decision-makers’ attempt to create coherent doctrinal stories where none exist.

With these lessons in mind, Part V lays out three possible versions of my argument, which I alluded to above: that the practice of stare decisis is unreliable; that stare decisis should be abandoned in close cases only; or that the Article’s insights should result in no doctrinal changes. I leave it to the reader to decide which explication of the theory is most persuasive.

II. ARGUMENTS FOR STARE DECISIS
In general, this article takes aim at the practice of stare decisis and argues that, at least in certain situations and within certain constraints, stare decisis may be unreliable. It is not my intention here to describe all of the arguments for stare decisis. Indeed, the doctrinal scope of stare decisis varies by context: constitutional cases versus non-constitutional cases;28 “pure” common-law cases, like contracts or torts, versus statutory cases;29 in specific states, federal courts, or international courts,30 and so on. These fine distinctions have practical and theoretical relevance in context. However, in this article, I paint with a broad brush. I rely on the popular conception of stare decisis: “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions, when the same points arise in litigation.”31 Stare decisis may have a horizontal component (where a court follows its own earlier-decided cases) and a vertical component (where a lower court follows a higher court’s earlier decided

28 See, e.g., Thomas E. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 Vand. L. Rev. 647, 703-04 (1999) (“Amidst all the contradictions and retractions in the modern Court’s doctrine of precedent, one point has achieved an unusual degree of consensus: that stare decisis has ‘great weight . . . in the area of statutory construction’ but ‘is at its weakest’ in constitutional cases.”). Cf. Lee J. Strang & Bryce G. Poole, The Historical (In)accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents, 86 N.C. L. Rev. 969 (2008) (criticizing the dichotomy described above). Strang and Poole cite opinions by a variety of justices to demonstrate that this dichotomy has much purchase on the Court, at both ends of the political spectrum. See id. at 972 (citing Chief Justice Rehnquist, Justice Scalia, Justice O’Connor, and Justice Breyer).

29 See, e.g., Melvin A. Eisenberg, The Nature of the Common Law vii (1988) (noting in the Preface that his book focuses on “that part of the law that is not based on [authoritative] texts,” and that “the same set of principles” does not apply to “the interpretation of constitutions, the interpretation of statutes, and the establishment of common law rules”). See also Brian C. Kalt, Three Levels of Stare Decisis: Distinguishing Common-Law; Constitutional, and Statutory Cases, 8 Tex. Rev. L. & Pol. 277 (2004); Rafael Gely, Of Sinking and Escalating: A (Somewhat) New Look at Stare Decisis, 60 U. Pitt. L. Rev. 89, 109 (1998) (“common law precedents enjoy a presumption of correctness stronger than that applied to constitutional cases, but not as constraining as that enjoyed by statutory precedents”);


I also use the terms “stare decisis” and “precedent” interchangeably, although there is a slight difference between the two terms. I use the terms interchangeably because “[w]hat I say here applies to both kinds of precedent.”

The argument in this Article may have more or less relevance in these various contexts. The problem of information cascades, for example, is vividly illustrated by a case study involving the Sarbanes-Oxley Act of 2002, in which a variety of federal district courts all followed one Eastern District of Pennsylvania decision from 2005, even though none of the subsequent courts were obliged to follow that rule. This analysis highlights the role that heuristics and cognitive bias may play in the development of case law, but it might be less illuminating in the context of, for example, whether Casey should have followed or overruled Roe.

Nonetheless, regardless of the context, stare decisis is defended for one or more of three primary reasons. First, stare decisis is defended because it is more likely to lead to correct results. This line of argument has its roots in Edmund Burke and other Burkean scholars, who argue that the reasoning ability of any given individual is small and that he would do better to rely on the received wisdom of his forebears. The Condorcet Jury Theorem is a different, but related, version of this argument. The Theorem argues that under certain constraints, as the number of decision-makers increases, the probability of reaching the correct result approaches one. Therefore, individual decision-making power is low; answers by large groups, over time, are more likely to be correct.


See supra note 17, at 6 n.2 (“Technically, the obligation of a court to follow previous decisions of the same court is referred to as stare decisis (“stand by what has been decided”), and the more encompassing term precedent is used to refer both to stare decisis and the obligation of a lower court to follow decisions of a higher one.”).

See infra Part III.A.1.

See infra Part IV.A.1.


Second, stare decisis is defended on legal positivist grounds. These arguments generally bracket the question of whether the received rule is correct or not. Instead, they contend that reliance on established legal doctrines makes the law more stable over time; more predictable so that parties can arrange their matters in accordance with the law; and more efficient and therefore welfare-enhancing. In this article, I use the shorthand “stability, predictability, and efficiency” to refer to these related arguments in support of stare decisis.

Finally, stare decisis is defended on the grounds that it preserves the legitimacy of the judiciary. In Planned Parenthood v. Casey, the plurality reasoned that it was obligated to uphold the “essential holding” of Roe v. Wade, in part to preserve “institutional integrity.” The plurality noted, among other things, that “the Court's legitimacy depends on making legally principled decisions.” If courts’ rulings were subject to the whims of the particular judge, then the public would lose faith in the judiciary.

A. BURKEAN TRADITIONALISM

In its most basic form, stare decisis – “[t]he doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise in litigation” – acts as a check on radical change. If a court at time t+1 is obligated to follow the decision of the court at time t, then it is less likely to be to able to propound its own view of the case. Stare decisis acts as a limit on the ability of a given court to rely on its “private stock of reason.” In this sense, stare decisis has Burkean elements to it, undergirded by a sense that prior decisions are more likely to be correct than newer decisions.

In Reflections on the Revolution in France, Burke explained his disagreement with the French Revolution: though the movement’s values were ostensibly desirable, it was essentially a quick attempt to change the political structure of the French government. Rather than quick change, Burke favored the wisdom found in tradition and noted the importance of connecting the current political system to the past:

By this unprincipled facility of changing the State as often, and as much, and in as many ways as there are floating fancies or fashions,

42 Id. at 845.
43 Id. at 866.
44 BLACK’S LAW DICTIONARY (8th ed. 2004).
the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.\cite{45}

Burke explains that by abandoning traditions men actually limit their own capabilities since they falsely believe they possess enough knowledge to create new political structures. Instead of working with the structures of the past to create a more stable government, men reduce themselves to “flies of a summer” with fleeting notions of how government ought to function.\cite{46}

While Burke was not opposed to generating new ideas in general, he was opposed to their quick implementation since he believed such an act was an insult to past generations of thinkers, as well as an abandonment of their legacy:

But one of the first and most leading principles on which the commonwealth and the laws are consecrated, is lest the temporary-possessors and life-renters in it, unmindful of what they have received from their ancestors, or of what is due to their posterity, should act as if they were the entire masters; that they should not think it amongst their rights to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society; hazarding to leave to those who come after them, a ruin instead of a habitation — and teaching these successors as little to respect their contrivances, as they had themselves respected the institutions of their forefathers.\cite{47}

Russell Kirk reflects on Burke’s desire to retain the wisdom of our forefathers, explaining that for Burke, “In the government of the nation, the people participated through their representatives – not delegates, but representatives, elected from the ancient corporate bodies of the nation, rather than from an amorphous mass of subjects.”\cite{48} Thus, according to Burke and other similar thinkers, “ancient corporate bodies” still play a role in the present-day political system since their contributions make up essential elements of our current system of law. A rapid abandonment of such contributions would result in unforeseen consequences.

\begin{footnotes}
\item[45] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 91-92 (1872).
\item[46] Id.
\item[47] EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 91 (1872).
\end{footnotes}
This kind of Burkean thinking underlies (implicitly if not explicitly) the common law system, which relies on case law and precedent to help determine the outcome of current cases: “A constitutional order with a strong dose of common-law judicial definition and a proclaimed fidelity to precedent pushes in a Burkean direction.” The common law system assumes that past cases can shed light on current cases since decisions made in the past retain their influence, thus enhancing the meaning and knowledge found in tradition. Strauss writes that this theory of constitutional interpretation was developed, over time, by common law lawyers, and it finds its most famous expression in Burke's great work. The theory is one of humility; of respecting the limits of human reason; and of making judgments about morality, fairness, and justice, but making them only within the narrow confines left open by tradition.

Strauss, in turn, cites Calabresi’s seminal piece on the subject, in which he argues that “in our constitutional culture there is actually a well-established Burkean practice and tradition of venerating the text and first principles of the Constitution and of appealing to it to trump both contrary caselaw and contrary practices and traditions.”

The common law was (at least by most accounts) established in England under King Henry II. He wanted to create a more unified system of law whereby the set of laws established in one area were concrete and applied to all other areas throughout England to establish more consistency and predictability in law. This system later spread to all the British colonies, prompting judges to decide cases based on precedents established in earlier cases. Initially, American judges under the common law system placed varying emphasis on the degree and circumstances to which they applied past precedent to current cases. However, while the connection between common law and stare decisis has continually evolved, a connection to

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50 See generally id.
STARE DECISIS IS COGNITIVE ERROR

precedent remains a central feature of the common law throughout American judicial history.\footnote{55}{Id.}

While some critics argue that relying on precedent without recognizing that past decisions might have been incorrect, supporters of stare decisis argue that the benefits of maintaining past decisions far outweigh the consequences. In fact, while Nelson recognizes there might be instances where past precedent is undoubtedly incorrect, falling beyond even the wide range of possible outcomes associated with each case, he suggests that these instances might be the exception and in general, upholding stare decisis proves more valuable than not.\footnote{56}{Id.} Similarly -- and still in the Burkean vein -- defenders of stare decisis argue that overruling past decisions, even if they currently seem incorrect in the eyes of the judges, may prove a worse option given that overturning precedent requires a sort of epistemological arrogance on the part of current judges.\footnote{57}{Id. at 34.} Nelson explains that “this was particularly true when a long line of decisions had all reached the same conclusion. If a series of judges had all deemed something to be a ‘correct’ statement of the unwritten law, a later judge who doubted the statement ought to be modest enough to question his own position.”\footnote{58}{Id. at 35.} Therefore, the collected wisdom found in the decisions of past judges ought to be considered and included in current decisions, both as a form of respect for tradition that Burke stressed, as well as for the actual information contained in precedent as decided by a group of knowledgeable judges.

B. STABILITY, PREDICTABILITY, EFFICIENCY

The Langdellian system of legal education assumes, relying on natural law and related theories, that the common law is the repository of the collected rationality of the Anglo-American people.\footnote{59}{Edward Rubin, What’s Wrong With Langdell’s Method and What to Do About It, 60 Vand. L. Rev. 609, 623-26 (2007)} Edward Rubin characterizes this as “Langdell’s mythology,” but one that has persisted for quite some time. By Langdell’s argument, courts should rely on precedent for essentially Burkean reasons -- because it is correct.

However, as Rubin points out, for over a century, it had been clear that the common law was not a “natural” institution that reflected all of the right answers to all legal questions. Instead, it arose out of an effort by King
Henry II “to suppress dissension by displacing local law in England with a system of royal justice that would be common to the entire realm.” Under this conception, reliance on precedent is desirable for instrumental reasons: it makes the law uniform, predictable, and stable.

By contrast, in the civil law tradition, “laws are written from the top down by the legislature to cover every possible situation. Judges are glorified clerks just applying the law.” The civil law system features less feedback from the bottom-up percolation of cases and thus, no guidance as to how future cases can (and should) be decided. Thus, stare decisis helps establish the predictability of law. Maltz gives a sharp example of the role of stare decisis in fostering predictability:

As an illustration of the point, consider the action of the Michigan Supreme Court in Parker v. Port Huron Hospital. In Parker the court abrogated the doctrine of charitable immunity, which had prevailed in the state since the decision in Downes v. Harper Hospital. Challenging the decision to overrule Downes, one might well conclude that charitable institutions planned their activities and budgets with the assumption that they would be immune from tort liability. Based on the same assumptions, these institutions may have failed to obtain liability insurance. Thus, the argument would conclude, Parker was wrongly decided because it defeated the justified expectations of the institutions relying on the Downes rule.

By this argument, stare decisis enables individuals to predict consequences and act accordingly. This also prompts stability in the law, since judges cannot make arbitrary decisions. This could be particularly true in property law, where overturning past decisions, even if current judges think them erroneous, might cause damage to the individuals involved as well as society as a whole. As Nelson notes, in terms of established rules of property, “if titles had passed in reliance on them or if people had otherwise conducted transactions in accordance with them – the resulting reliance interests could provide a reason to adhere to decisions

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60 Id. at 627.
62 Id.
64 Id. at 368-69 (citations omitted). Maltz goes on to note, however, that the new rule was made prospective in application, so charities that had relied on the old rule would not be affected.
even if they were now deemed erroneous.”

In such cases, maintaining a commitment to past decisions in order to ensure and protect reliance interests remains an important feature of the argument in favor of the advantages of stare decisis, even against critics’ claim that an “important value is getting the right answer to critical questions of constitutions meaning.”

The Supreme Court has endorsed such a view, commenting that “[c]onsiderations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved.”

Stare decisis prevents the disruption that would occur if judges were constantly seeking the “correct” rule.

Relying on precedent also helps ensure efficiency in the common law system. Cardozo writes explains that by relying on precedent, current judges expedite the decision making process. Through stare decisis, “a stock of judicial conception and formulas is developed, and we take them, so to speak, ready-made.”

Hathaway explains the implications of Cardozo’s realization on the efficiency of stare decisis, stating that, “By relying on past decisions, judges can save significant time and effort and thereby consider far more cases than would otherwise be possible. Judges can turn to past analyses and avoid rethinking every aspect of a decision.”

“The labor of judges would be increased to the breaking point if every past decision could be reopened in every case, and one could not lay one’s course of bricks on the secure foundation laid by others who had gone before.”

This argument has found purchase even at the Supreme Court.

There is another component to the argument that stare decisis promotes efficiency. These scholars argue, essentially following Posner, that the common law system is and has been geared toward economic efficiency. In their seminal book on tort law, Landes and Posner write that “the common law of torts is best explained as if the judges who created the law were trying to promote efficient resource allocation.”

Posner does not cabin

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66 Professor Merrill, 46.
71 Florida Dep’t of Health v. Florida Nursing Home Ass’n, 450 U.S. 147, 154 (1981) (Stevens, J., concurring) (noting that “[t]hese concerns are not . . . insubstantial,” and citing Cardozo).
this theory to tort law; “the common law [itself] is best (not perfectly) explained as a system for maximizing the wealth of society.”

“The gist of that contention is that in a common law system there are incentives for repeat players to litigate inefficient rules but not to litigate efficient rules; [however judges decide a case,] this mechanism will inevitably lead to an increase in the stock of efficient legal rules.” This convergence-on-efficiency theory has its roots in Lord Mansfield’s proclamation that the common law “works itself pure,” a position that bad rules will get weeded out over time.

Thus, whether the focus is on the time that judges save or the maximization of social wealth, scholars for centuries have argued that reliance on precedent furthers efficiency.

C. JUDICIAL LEGITIMACY

“One of the most widely shared values in the American political system is that principles governing society should be ‘rules of law and not merely the opinions of a small group of men who temporarily occupy high office.’ The doctrine of stare decisis reinforces this value . . . .” Maltz points out that stare decisis (1) simply makes judicial decisions look better, because the instant decision is based on pre-existing law and not impulsive preferences; and (2) implies a judicial role of “law-finding” and not “law-making,” a value that does in fact limit judicial discretion.

Along these lines, Nelson notes, “According to many commentators, frequent overruling jeopardizes public acceptance of the courts’ decisions.” The joint opinion of Justices Souter, Kennedy, and O’Connor in Planned Parenthood v. Casey, states, “[t]he Court’s power lies . . . in its legitimacy.” Nelson explains that for these Justices it was important to adhere to Roe v.

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75 Omychund v. Barker (1744) 26 Eng. Rep. 15, 23 (Chan.).
76 Most behavioral critiques of the common law, they tend to focus on this efficiency argument. For example, Hanson and Hart have argued persuasively that the famous “BPL” formula developed by Judge Learned Hand, often cited as an example of the efficiency of the common law of negligence, does not in fact yield the efficient outcome in that case. See Jon D. Hanson and Melissa Hart, Law and Economics, in Blackwell’s Companion to Philosophy of Law and Legal Theory, 311-31 (Dennis Patterson, ed., 1996).
78 Id. at 371-72.
Wade so that the country would not lose “confidence in the Judiciary.” In this respect, stare decisis helps maintain the legitimacy of the court, thus aiding in stability since otherwise the public would lose faith in the court and therefore doubt the strength of the rule of law.

D. CONCLUSION

In short, stare decisis is defended for any or all of the preceding reasons. In the next section, I catalogue common cognitive and psychological phenomena that undercut these arguments for stare decisis.

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III. COGNITIVE BIASES THAT UNDERCUT ARGUMENTS FOR STARE DECISIS

“If precedent represents a weak or impoverished learning device, then a common law system of adjudication seems unlikely to produce reliable results.”80

As described in the previous Part, there are many reasons a system of stare decisis is desirable. My argument in this Article is not that those reasons are illegitimate or even that they are incorrect on their own terms. Rather, the behavioral literature of recent years gives us serious reason to question the epistemic basis of those arguments. In turn, we should be skeptical of using stare decisis as a decisional guidepost. In this Part, I survey that behavioral literature.

Three preliminary points are in order. First, the following discussion is not meant to be exhaustive. There may be other behavioral phenomena that support my thesis; I only discuss those that are most relevant to my argument and relatively well known. Second, I do not discuss the phenomena in much depth. I summarize the key findings of the literature to the extent necessary to develop the doctrinal application of the literature. The interested reader can find citations to the underlying papers, studies, and experiments in the footnotes. Finally, much of the discussion tracks that set forth by Hanson and Yosifon in The Situational Character, which provides some more detail on the phenomena I discuss as well as a broader survey of such phenomena.81

80 Eric A. Talley, Precedential Cascades: A Critical Appraisal, 73 S. CAL. L. REV. 87, 92 (1999). Talley ultimately concludes that precedent cannot be fully explained by cascades. But crucially, he reaches this conclusion because his analysis focuses exclusively on cascades and not other cognitive biases. He writes,

This does not mean, however, that considerations of [cascades] are wholly irrelevant to advance our theory of judging and judges. Indeed, cognitive biases or reputational concerns alone might drive judges to fall into a cascade. But if that be so, the case must be made on those terms, and not as a set of phenomena that exacerbate existing informational cascades.

Id. at 124. My analysis seeks precisely to make “the case . . . on those terms,” surveying a variety of cognitive and behavioral phenomena. I also respond more fully to Talley near the end of the paper.

At the end of this section, I make a bold claim: the behavioral evidence gives us very strong reason to believe that the common law system (1) reflects cognitive biases; (2) magnifies cognitive biases; or both. I use “common law” loosely here. The critique applies to typical common law subjects, like contracts or torts, but also to statutory and even constitutional interpretation. It applies to federal courts and state courts; trial courts and appellate courts. It applies to the Supreme Court of the United States and it applies to district courts. It applies to instances where courts rely on prior court decisions and it applies to instances where they rely on earlier statues, and other sources. It even applies to legal policymaking in general, that is, not just to court decisions. In short, the critique applies very broadly.

In a slightly different context, Adrian Vermeule writes, “The key point is not that judges are likely to get things wrong; it is that when they do get things wrong, they are likely to err in systematic rather than random ways.” Work from several academic disciplines shows that we humans possess a series of correlated biases that make us more likely to favor existing conditions, overestimate the costs of change, and underestimate the benefits of new social arrangements. If these phenomena motivate us, consciously or not, to overvalue what we already possess, then a legal system designed to rely almost exclusively on past decisions probably places too much emphasis on the past. The presence of correlated biases should be of great concern to legal scholars and policymakers.

A. Choice Biases

Hanson and Yosifon describe choice biases as those which “most clearly influence (and challenge economists’ typical assumptions regarding) people’s choices.” Recall that, according to the dominant view, stare decisis is defended because it leads to correct adjudication, stability, efficiency, and legitimacy. If lawyers’ and judges’ choices are shaped by these heuristics and biases, then decisions that we think foster these desirable goals may instead be reflecting the fact that we are “cognitive misers,” trying to avoid “the intolerable labor of thought.”

84 Id. at 23.
85 HAND, supra note 1, at 241.
1. Cascades

Perhaps the most relevant, and potentially the most destructive to the idea and doctrine of stare decisis, is the phenomenon of cascades. Depending on the jurisdictional posture of a given case, stare decisis either requires or encourages judges to follow the decisions of an earlier, or higher, court. Each case has reached a conclusion (a “holding”) based on certain reasons (unsurprisingly, the “reasoning”). For a variety of reasons, it may be desirable for a subsequent court to follow a previous one. However, the cascade phenomenon suggest individuals now will follow a decision that was made at some earlier time, merely because it was popular -- not because it is “correct” or “preferable” in any objective sense.

Scholars generally distinguish between three different types of cascades: information cascades, reputational cascades, and availability cascades.\(^86\) As Kuran and Sunstein write,

An availability cascade subsumes two of the special cascades that have recently received considerable attention in the social sciences, though not in law: informational cascades and reputational cascades. An informational cascade occurs when people with incomplete personal information on a particular matter base their own beliefs on the apparent beliefs of others. . . .

Like an informational cascade, a reputational cascade is driven by interdependencies among individual choices. It differs, however, in the underlying personal motivations. . . . In seeking to achieve their reputational objectives, people take to speaking and acting as if they share, or at least do not reject, what they view as the dominant belief. . . .

Reputational and informational cascades are not mutually exclusive. Ordinarily, they exhibit interactions and even feed on one another. The resulting composite process, which is generally triggered by a salient event, is what we are calling an availability cascade.\(^87\)

The phenomenon of cascades -- particularly information cascades -- has relevance in law.


\(^87\) Id. at 685-87.
A strictly informational cascade occurs when people start attaching credibility to a proposition P (e.g., a certain abandoned waste dump is dangerous) merely because other people seem to accept P. To recast an earlier illustration, suppose that Ames signals that he believes P. Barr, who would otherwise have major reservations, believes P because Ames appears to do so. Cotton, who would have dismissed the proposition as silly, begins taking it seriously upon discovering that not just Ames but both he and Barr are believers. Noticing that Ames, Barr, and Cotton all seem alarmed, Douglas then accepts P without further thought. When Entin learns that all of his friends believe P, he joins the pack of believers on the grounds that their shared understanding cannot be wrong.88

In a recent study, Salganik and his co-authors describe the results of a music downloads study.89 Participants in the study had the opportunity to download one of a wide range of songs online. However, the authors introduced an element of social influence: participants could see what songs were being downloaded by others in a sort of “most popular songs” list. (The list, of course, could be manipulated.) In general, the best songs never did very badly, and the worst songs did not do particularly well. However, “almost any other result is possible.”90 When songs were on the list of popular songs, participants downloaded those songs. In other words, the mere signal of a song’s popularity increased the frequency of downloads -- as participants received a “relatively weak” information signal.91 The increased downloads, of course, created a sort of feedback loop, and those songs moved up on the list of popular songs. In making these seemingly independent decisions, participants were susceptible to significant social influence and demonstrated an information cascade.

It is important to note that information cascades are not necessarily irrational. As Vermeule writes, an information cascade occurs when “individuals rationally allowed the presumed information of others to

88 Id. at 721. The authors explain that reputational and availability cascades involve some element of social pressure. I do not dwell on those here, not because they are not relevant but, for simplicity’s sake, I assume that judges face no social or reputational pressures. Of course, this assumption may not be correct -- but to the extent that the assumption does not hold, my argument is even stronger.
89 Matthew J. Salganik et al., Experimental Study of Inequality and Unpredictability in the Artificial Cultural Market, 311 SCIENCE 854 (2006).
90 Id. at 855.
91 Id. at 854.
swamp their private judgments.” If you have better information than I do, then it is quite rational for me to follow your decisions. The problem arises when I assume you have better information and you don’t. As I describe in the next Part, certain phenomena may alert us to the presence of a cascade.

2. Status Quo Bias

Information cascades are an external influence on individuals’ decision-making; the external cues of popular songs influence private choices about what to download. Status quo bias, on the other hand, is an internal influence on choice. It operates regardless of what is happening around us.

Kahneman and his co-authors discuss status quo bias in their article on “anomalies” -- psychological phenomena that are difficult to fit into the rational actor model, because “implausible assumptions are necessary to fit it into the paradigm.” Status quo bias is such an anomaly. In one experiment, individuals were asked to choose between several alternatives. In the “neutral” setting, they were simply asked to make a choice. In the “status quo” setting, one was the current arrangement, and they were asked to stick with the status quo option or choose an alternative. “Many different scenarios were investigated, all using the same basic experimental design. The results implied that an alternative became significantly more popular when it was designated as the status quo. Also, the advantage of the status quo increases with the number of alternatives.” In another study, consumers were asked to choose among utility providers. Some respondents currently had very reliable utility service. Approximately sixty percent of those respondents expressed a “preference” for high-reliability service. Other respondents currently had unreliable utility service. Approximately sixty percent of those respondents expressed a preference for low-reliability service. Other respondents were willing to switch to the other option. In both cases, individuals “demonstrated a pronounced status quo bias.”

Kay, Jimenez, and Jost explain our preference for the actual and anticipated status quo through the twin examples of sour grapes and sweet

94 Id. at 198.
95 See id.
96 Id.
lemons. They write that humans have a large capacity for rationalization, even in suboptimal situations. “It has been argued that people possess a ‘psychological immune system’ that allows them to adjust to suboptimal outcomes by enhancing the subjective value of the status quo while devaluing alternatives to it.”\(^\text{97}\) The sour grapes/sweet lemons analogy helps explain how humans rationalize situations by bringing “preferences into line with expectations.”\(^\text{98}\) In the famous fable, the grapes are initially attractive. However, once the grapes become unattainable, they “become” sour. Of course, the character of the grapes has not changed at all; we merely rationalize the fact that we know we cannot get the grapes by \textit{making ourselves believe} the groups are sour. More interesting, however, is the “sweet lemons” phenomenon. In this situation, an initially less favored outcome (the lemon) becomes more favorable as the likelihood of such an outcome becomes greater -- the lemons become sweeter if they are the more attainable.\(^\text{99}\) (This begins to cross over into system justification theory, which I discuss in Part B.1, \textit{infra}.)

Rationalization of the anticipated status quo demonstrates humans’ strong tendency to adapt to, and “prefer” the status quo. We justify events that are \textit{likely} to happen, even those that initially seem unfavorable, just as we justify the \textit{already} existing status quo. In other words, if we already have lemons, we are likely to justify our possession of lemons by believing they are sweet rather than try to get grapes which are more unattainable, and therefore we believe them to be sour. In Kay et al.’s study, survey respondents (prior to the 2000 election) were told that George W. Bush’s election was very likely based on certain polls. In light of this information, Republicans and Democrats increased their favorability rating of Governor Bush.\(^\text{100}\) The same result, in the opposite direction, occurred when respondents were told that polls showed Vice President Gore likely to win.\(^\text{101}\) In short, we “accommodate, internalize, and even \textit{rationalize} key features” of the status quo.\(^\text{102}\) When given a menu of options, we tend to choose the status quo, and when a given arrangement is about to become the status quo, we are remarkably adept at coming up with reasons why it is sweet and all others are sour.

\(^{98}\) \textit{Id.} at 1300.
\(^{99}\) \textit{Id.} at 1310.
\(^{100}\) \textit{See id.} at 1305-06.
\(^{101}\) \textit{See id.}
3. Endowment Effect

One reason we may prefer the status quo is because we over-value it relative to other options. As Russell Korobkin explains, “the much studied ‘endowment effect’ stands for the principle that people tend to value goods more when they own them than when they do not.” Jones and Brosnan define the endowment effect as “a psychological phenomenon that appears to underlie some seemingly irrational pricing of property and to thereby impede efficient exchange.” The endowment effect challenges the Coase Theorem, because the party holding a certain entitlement has an above-market willingness to accept price. When the other party is only willing to pay the market price, the entitlement will not change hands. This has legal implications because the Coase Theorem suggests that, among other things, (when transaction costs are low) parties will bargain around injunctions and other legal entitlements regardless of the initial allocation of those entitlements. However, given the endowment effect, the efficient outcome is not likely to occur.

In Knetsch’s oft-cited study, one group of students was offered a choice between a coffee mug and a chocolate bar as compensation for participating in the experiment. The second group was given a coffee mug initially, and then given the opportunity to trade it for a chocolate bar at the end of the experiment. The third group was given a chocolate bar at the beginning of the experiment, and then at the end was given the opportunity to trade it for a coffee mug. The results of the experiment show that under the choice condition given to the first group, 56% of the students selected the mug. However, each of the other two groups exhibited a strong preference for what they already had: ninety percent of those given the mug refused to trade it for a chocolate bar while ninety percent of those given the chocolate bar refused to trade it for the mug. Each group “preferred” its initial endowment.

104 Id. at 1231.
105 See, e.g., Daniel Kahneman & Richard Thaler, Experimental Tests of the Endowment Effect and the Coase Theorem, 98 J. POL. ECON. 1325 (1990); Ward Farnsworth, Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral, 66 U. CHI. L. REV. 373, 413 (1999) (“A study of twenty old-fashioned nuisance cases litigated to judgment revealed no bargaining after judgment in any of them. Nor did any of the lawyers contacted believe that bargaining after judgment would have occurred if the loser had won.”).
It is worth noting that, for purposes of my analysis, it is not especially important why the endowment effect, or any of these phenomena, actually occur. Jones and Brosnan attempt to explore this question, and posit that the so-called “irrational” psychological phenomena may include some number “that once (and indeed long) were substantively rational, in the traditional economic sense,” but no longer are. However, this is not relevant to the first level analysis. If humans exhibit certain tendencies that make them over-reliant on precedent, loosely defined, that finding has important implications for the law. Why the endowment effect occurs is relevant to the to the second-level analysis, the “So what?” question. If we are concerned about these biases and want to use procedural or other methods to debias lawyers and judges, then it is helpful to know how and why these phenomena occur. However, their origins are not necessarily relevant to my overall hypothesis.

4. Framing Effect

Gonzalez et al. explain that “the ‘framing effect’ is observed when a decision maker’s risk tolerance (as implied by their choices) is dependent upon how a set of opinions is described. Specifically, people’s choices when faced with consequentially identical decision problems framed positively (in terms of gains) versus negatively (in terms of losses) are often contradictory.” As a result, individuals prefer sure gains to risky gains and prefer risky losses to sure losses. The phenomenon has even made its way into the popular press: on MSNBC.com, Choi begins an article by asking, “Is a pound of stones heavier than a pound of feathers? Of course they both weigh the same, but the decisions people make are remarkably susceptible to how choices are presented or framed.” Choi’s article, about the prevalence of emotions in decision-making, concludes, inter alia, that the prevalence of the framing effect “shows emotions are embedded in our

brain when it comes to making decisions,” and thus represent a cognitive bias that must be accounted for when evaluating preferences.

Kahneman and Tversky, who identified and named the phenomenon, describe the framing effect as “both pervasive and robust.” Moreover, it is “as common among sophisticated respondents as among naïve ones.” This point is particularly relevant to the law. One easy way to dismiss the discussion of these phenomena is to posit that they manifest themselves in trivial settings like controlled studies involving chocolate bars. However, on closer inspection, that claim does not hold water. Kahneman and Tversky’s studies show that the framing effect affects sophisticated respondents. People demonstrate a strong status quo bias even when they believe their responses will affect policy. The endowment effect is a barrier to post-judgment bargaining in real-life lawsuits, when individuals presumably have important interests at stake. Respondents report support for an undesirable status quo even when presented with the important -- and divisive -- issue of a presidential election. In sum, the facile response, “Sure, but that wouldn’t happen in real life when judges are faced with serious issues” is not compelling. Indeed, as I show in Part IV.A.2, heuristic judgments are reflected even at the United States Supreme Court.

5.

Path Dependence

Path dependence provides another example of how individuals demonstrate an undue deference toward existing arrangements. Pierson describes path dependency in his article *Increasing Returns, Path Dependence, and the Study of Politics*, explaining that our current perception of political and economic outcomes is informed by the timing in which the initial political or economic decision was made. Therefore, a seemingly minor decision gains significance as it is propagated over time and more people become accustomed to the consequences of that decision. Liebowitz and Margolis provide an example of path dependency using the concept of videotaping formats, Beta and VHS. They explain that


113 Farnsworth, supra note 105, at 413.

an initial decision by consumers to use VHS, without previous knowledge as to which format provides better quality, might have much greater implications in the future if based on this arbitrary decision everyone continues to buy VHS for compatibility purposes.\footnote{116}

Liebowitz and Margolis define three different degrees of resulting path dependency. First degree path dependency explains that these initial decisions are made at random and thus efficiency models cannot predict which format will be chosen. With first degree path dependency, there is no inefficient outcome regardless of which option the public chooses, assuming that Beta and VHS provide similar quality. If over time it becomes apparent that Beta is the better option, then second degree path dependency occurs. In this scenario, choosing arbitrarily was rational given the initial conditions of limited knowledge as to which option was better. However, in retrospect (once we know that Beta is superior), the public realizes that the wrong decision was made initially. Third degree path dependency takes this one step further, assuming conditions where Beta was known to be superior from the start. If a small initial majority of consumer were to choose VHS, customers who prefer Beta -- but have not yet made a decision -- might choose VHS, unaware that others might also prefer Beta. If the present-day benefits of switching from VHS to Beta outweigh the costs, yet consumers remain hesitant to switch because they are unwilling to leave their current system, third degree path dependency occurs again.\footnote{117}

Pierson explains that path dependence is significant because individuals become accustomed to current conditions, regardless of why and when they occurred. Thus, costs of switching increase over time, and the originally-arbitrary decision becomes lasting and substantial.\footnote{118} Pierson relates this concept to increasing returns to scale, stating, “in an increasing returns process, the probability of further steps along the same path increases with each move down the path . . . . To put it a different way, the costs of exit -- of switching to some previously plausible alternative -- rise.”\footnote{119} He then explains that “formal, change-resistant institutions” fall especially susceptible to this process, since the cost and ambiguity associated with exit remain high. Pierson concludes that understanding path dependency

\footnote{116} If Pierson’s example seems dated, substitute “HD-DVD” and “Blu-ray” for “Beta” and “VHS.”
provides “an important caution against a too easy conclusion of the inevitability, ‘naturalness,’ or functionality of observed outcomes,” cautioning us to consider that current institutions might not have been derived from an understanding of efficient conditions, but instead, created based on conditions that are not only ancient but also initially arbitrary. As Mark Roe points out, path dependence means that “survival does not imply present-day superiority to untried alternatives.”

In her seminal article on path dependence and stare decisis, Oona Hathaway distinguishes between increasing returns path dependence, evolutionary path dependence, and sequencing path dependence. The first category has its roots in the economics literature. Once a given decision is made, it is less costly to continue down that same path than to change to a different path. In this context, path dependence arises out of increasing returns. Evolutionary path dependence has its origins in the biological literature, in which the current genetic makeup of a species is constrained by its past evolutionary changes. Sequencing path dependence refers to the process by which the order in which choices are made affects the outcomes of those choices. In other words, if ten people need to make a decision seriatim, each person’s individual decision could be affected by where he chooses in the lineup.

6. Sticky Defaults

Relatedly, individuals are generally hesitant to deviate from current conditions because of the ease with which default rules get entrenched. On the Stickiness of Default Rules, by Ben-Shahar and Pottow, explores the factors prompting parties to continue using undesirable (but waivable) default rules in contract law, even when opting out of a legal default rule did

125 Oona Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 IOWA L. REV. 601, 607-08 (2001). What Hathaway calls “sequencing path dependence” is similar to what I refer to in the earlier section as an information cascade. See id. at 608 n.20 (describing and then distinguishing the two).
not impose high costs or ambiguous outcomes on the parties.\footnote{Omri Ben-Shahar and John A. E. Pottow, On the Stickiness of Default Rules, 33 Fla. St. U. L. Rev. 651, 651 (2006).} The first reason they explain for this irrational phenomenon is that “in the presence of a familiar and commonly utilized background provision … a transactor might fear that proposing an opt-out from the default will dissuade his potential counterparty from entering into the agreement.” \footnote{Omri Ben-Shahar and John A. E. Pottow, On the Stickiness of Default Rules, 33 Fla. St. U. L. Rev. 651, 652 (2006).} The counterparty may view any opt-out from the default as a “trick”, used to cover up an unknown problem.\footnote{Omri Ben-Shahar and John A. E. Pottow, On the Stickiness of Default Rules, 33 Fla. St. U. L. Rev. 651, 652 (2006).} Therefore, regardless of the practicality and efficiency of opting out of a default rule, a party might stick with the default rule since it attracts less suspicion and might hinder forming an agreement. This becomes especially apparent in areas where “it is uncommon for other market participants to negotiate a tailored provision, that is, where the background rules and templates are well entrenched and commonly employed.”\footnote{Omri Ben-Shahar and John A. E. Pottow, On the Stickiness of Default Rules, 33 Fla. St. U. L. Rev. 651, 655 (2006).}

Ben-Shahar and Pottow further explain the default rules might work in a similar manner to the concepts underlying the endowment effect. If a legal default is viewed as an entitlement, and added value is placed on a legal default because an individual already possesses or understands that default, then he will be less likely to opt out of the default. Based on Korobkin’s experiment investigating the endowment effect, Ben-Shahar and Pottow conclude that the “findings do, indeed, lend support to the conclusion that human beings are cognitively disposed to prefer a default legal rule in contractual negotiations, irrespective of the content of that legal rule.”\footnote{Omri Ben-Shahar and John A. E. Pottow, On the Stickiness of Default Rules, 33 Fla. St. U. L. Rev. 651, 655 (2006).}

Also stemming from Korobkin’s experiments on the endowment effect, Ben-Shahar and Pottow find that individuals prefer legal default rules because choosing an opt-out option might leave individuals with a greater feeling of regret. Korobkin finds that individuals prefer options in which they do not have to take action to change the current situation. Even if individuals are not happy with a current situation, the perception that they will be worse off after changing the situation (whether or not that perception is correct) provides a powerful disincentive to change, since then individuals might regret their action. In this sense, regret is worse than
accepting the current sub-optimal situation. Thus, Ben-Shahar and Pottow conclude “the attractive role of inaction in the service of ‘regret avoidance’ by decisionmakers”\textsuperscript{131} provides a powerful motive to stick with commonly known default rules.

B. ATTITUDES AND MOTIVES

The rational actor model typically assumes that individuals have certain preferences, they think about those preferences, and then choose a certain course of action by exercising their will.\textsuperscript{132} The choice biases discussed above demonstrate that we do not “think” the way we think we think. The attitudes and motives discussed here demonstrate that we do not “prefer” the way we think we prefer. In other words, our reasoning is, among other things, motivated to justify existing social arrangements, to create coherent narratives for observed phenomena, and to simplify ambiguities. I discuss these in more detail below.

1. System Justification Theory

John Jost and his co-authors have developed the idea of system justification theory to explain why individuals support and “prefer” the status quo, even when doing so appears to do more harm than good. Jost, Banaji and Nosek define the theory of system justification as “the process by which existing social arrangements are legitimized, even at the expense of [one’s] personal and group interest.”\textsuperscript{133} In several of Jost’s articles on the subject he and his co-authors explain how the system justification theory prompts individuals to value the system they currently have, especially when the system appears unlikely to change.\textsuperscript{134} System justification theory goes further than this, however, in that it motivates people not only to accept the current system, but to justify it. Jost and Hunyady explain, “System justification theory holds that people are motivated to justify and rationalize the way things are, so that existing social, economic, and political arrangements tend to be perceived as fair and legitimate.’’\textsuperscript{135} In other words, people not only accept the status quo - they come up with

\textsuperscript{132} See, e.g., Hanson & Yosifon, \textit{supra} note 81, at 25-26.
\textsuperscript{134} John Jost, Mazarin Banaji, & Brian Nosek, \textit{A Decade of System Justification Theory}, 25 POL. PSYCH. 881, 887 (2004).
reasons why it is right that the world is as it is.

Jost and his colleagues give possible explanations as to why individuals practice system-justification. For example, individuals may fear broad-based social change, preferring systems they know and understand. “For many people, the devil they know seems less threatening and more legitimate than the devil they don’t.” In cases where the system seems unlikely to change, individuals rationalize the system in order to convince themselves the system is fair, increasing “satisfaction with one’s situation.”

While system justification theory may lead individuals to self-report a relatively high level of satisfaction with the system, Jost explains that such reasoning actually hampers systems from evolving towards a more fair and inclusive system. For example, if individuals rationalize the status quo, they are unlikely to change it and may continue to justify an often unfair system without exploring new possibilities. Jost also describes the legal implications of system justification theories. For example, victims of abuse or discrimination might be unlikely to bring attention to their cause if doing so would threaten the status quo. More generally, Jost explains that the system justification theory “identifies important obstacles to social change in general, as well as to change in law and legal scholarship. Law, lawyers, and legal scholars need to take seriously the research on system justification motives and processes.”

In a recent article, Blasi and Jost point out that the Casey court could point to only two examples of the Supreme Court directly overturning an earlier precedent. They hypothesize that this could be in part because

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140 Gary Blasi & John Jost, System Justification Theory and Research: Implications for Law, Legal Advocacy, and Social Justice, 94 CAL. L. REV. 1119, 1165 (2006). Of course, the Supreme Court has overruled itself on more than these two cases (Brown overruling Plessy and Lawrence overruling Bowers). However, the point remains; the Court is generally loath to overrule prior cases. See, e.g., Indiana v. Edwards, 128 S. Ct. 2379, 2388 (2008) (“Indiana has also asked us to overrule Farretta. We decline to do so.”); Granholm v. Heald, 544 U.S. 460, 488 (2005) (“Recognizing that Bacchus is fatal to their position, the States suggest it should be overruled or limited to its facts. As the foregoing analysis makes clear,
“cognitive dissonance, implicit biases, and system justification motives affect judges, just like the rest of us.”

A broader version of this point is precisely the claim I make, and develop, in this Article.

2. Motive to Simplify

The motive to simplify and the motive to cohere provide another set of motivational factors prompting individuals to fall subject to a plethora of cognitive biases. Hanson and Yosifon describe these motivations as rooted in individuals’ need to validate their own self-affirming beliefs. Similar to the sour grapes and sweet lemons argument, they explain that people often shape their beliefs to fit the status quo, since this bolsters their perception of the current situation they find themselves in. This also follows from system justification theories where individuals believe the current system is legitimate and just, and thus, as part of that system, individuals positively affirm their own beliefs.

Yet the motive to simplify can actually hinder self-affirmation, as it sometimes conflicts with other motives and therefore complicates our desire to affirm our set of motives as a whole. Ziva Kunda explains that “we prefer those hypotheses that have greater simplicity, that is, require fewer additional hypotheses or assumptions to account for the full range of evidence.” Hanson and Yosifon further note that we prefer simple social theories and explanations to more complicated versions because our minds operate “under scare capacity, cognitively, temporality, and conceptually.” This motive to simplify, however, is often at odds with other motivations, such as the motive to be accurate, which requires more complex thought and explanation. This becomes problematic for individuals since “the conflict between the motive for simplicity and the motive for accuracy may spill over and cause discord for our motive of self-affirmation.”

we decline their invitation.”); *Thornton v. United States*, 541 U.S. 615, 624 n.4 (2004) (“Under these circumstances, it would be imprudent to overrule, for all intents and purposes, our established constitutional precedent, . . . and we decline to do so at this time.”). Moreover, the mere fact that no precedent supports a given position is itself a sort of argumentative “trump.” See infra Part IV.A.2.


142 Hanson & Yosifon, supra note 83, at 106.

143 Hanson & Yosifon, supra note 83, at 106.


145 Hanson & Yosifon, supra note 83, at 106.

146 Hanson & Yosifon, supra note 83, at 106.
3. Motive to Cohere

The motive to cohere explains why we are not comfortable with conflicting sets of motives, such as the combination of the motive to simplify with the motive to be accurate. “Because we value coherence, the desire to see it in ourselves dovetails with our motive for self-affirmation.” Thagard explains that individuals strive to make sense of themselves and the outside world, and attempt to do so by making information cohere. He describes this as “the activity of fitting something puzzling into a coherent pattern of mental representations that include concepts, beliefs, goals and actions.” He further explains that “coherence can be understood in terms of maximal satisfaction of multiple constraints,” working together to form the most coherent story possible given the information available. Hanson and Yosifon explain that on an individual level we seek to make our current situation cohere with our personal desires. In order to make our current situation more desirable, we compensate for a situation we dislike by physically gaining something (for example a monetary compensation), or else we alter our beliefs about that situation. Think here of the young associate who hates his BigLaw job but justifies keeping the job on the basis of his large paycheck.

On a group level, we seek coherence between our beliefs and the group’s beliefs, but this motive often stems from pluralistic ignorance. For example, in the “Princeton drinking study,” Prentice and Miller, college student respondents mis-estimated their peers’ attitudes toward alcohol consumption. Then, in turn, they overestimated the gap between their peers’ drinking and their own. This is problematic when pluralistic ignorance influences behavior, prompting individuals to alter their perceptions (which might initially be correct) to fit what they misperceive are the perceptions of others in order to promote group coherence. Unfortunately, “the problem of pluralistic ignorance and the motive for group coherence distorts many social norms and would seem to have significant implications for policy and law” as many decisions in these areas are made based on inaccurate assumptions.

147 Hanson & Yosifon, supra note 83, at 107.
148 PAUL THAGARD, COHERENCE IN THOUGHT AND ACTION xi (2000).
149 PAUL THAGARD, COHERENCE IN THOUGHT AND ACTION 17 (2000).
150 Hanson & Yosifon, supra note 83, at 108.
152 Hanson & Yosifon, supra note 83, at 115.
C. STARE DECISIS IS COGNITIVE ERROR

Stare decisis -- reasoning from precedent -- requires adhering to a prior decision because it is the prior decision, not because it is necessarily correct. Frederick Schauer has explained that reasoning from precedent is a commonplace in all forms of argument, not just legal argument.\textsuperscript{153} When a younger child argues that he should be allowed to do something because his older sister was allowed to do so when she was the same age, the child is arguing based on precedent. He is essentially saying, “You should follow the same rule in this case that you followed in the prior case.”\textsuperscript{154} The youngster expects the prior rule to apply in his case, regardless of whether the rule was correct or is correct now.

However, taken together, the phenomena outlined above pose a serious challenge to this mode of reasoning. First, the way we humans make choices strongly suggests that we are inclined to choose existing arrangements, not because they are preferable but merely because they exist. Second, our brains are hard-wired in such a way that even the act of reasoning -- something that is at the heart of every judicial opinion -- is skewed toward viewing the existing set of legal rules as just, right, and natural.

In general, we (lawyers, judges, and citizens) are likely to overvalue existing legal entitlements because of the endowment effect. The Coase Theorem, which predicts that individuals will bargain around inefficient injunctions, turns out not to work in practice as it should in theory, in part because parties overvalue the injunction once it is in place.\textsuperscript{155} Similarly, path dependence, the stickiness of default rules, and status quo bias suggest a cognitive predilection in favor of the way things are and have been. Thus, even judges with a good faith interest in being alert to the possibility of inefficient or otherwise undesirable precedents may fail to see that they are perpetuating, rather than mitigating, the rules’ effects.

This is illustrated by the phenomenon of information cascades. Eric Posner and Cass Sunstein have made a version of my argument in their

\textsuperscript{153} Frederick Schauer, Precedent, 39 Stan. L. Rev. 571, 572 (1987).
\textsuperscript{154} See id.
2009] STARE DECISIS IS COGNITIVE ERROR [Vol. __: 36

2006 article, *The Law of Other States.* There, Posner and Sunstein develop a framework for analyzing when courts in one jurisdiction ought to give persuasive authority to a rule laid down in a similar case in a foreign jurisdiction. They note that the Condorcet Jury Theorem typically suggests that if many other relevant decision-makers have reached a particular result, then *this particular* decision-maker has reason to believe, with a relatively high probability, that the outcome is the correct one. This rationale applies to courts’ decisions too; if several courts reach a particular outcome, we might be more confident in the correctness of their result. But this conclusion requires each iterative decision to be independent, a criterion that is violated when cascades are present.

Earlier, I noted that the information cascade phenomenon is not irrational -- a given judge, presuming that those who came before him had good information, has a high level of confidence that they are correct and rationally follows their lead. However, as Vermeule points out, “[a] strategy that is individually rational for judges at any given time -- following custom or tradition or precedent -- is harmful to all if followed by all, because it drains custom or tradition or precedent of any epistemic value.” At least to the Condorcetians and Burkeans, following tradition is more likely to lead to the correct answer. But if individuals are “withdrawing” from this bank of knowledge but not contributing to it, then - - by virtue of information cascades -- we are all worse off.

So too with status quo bias and the endowment effect. Typically, we assume that judges will independently evaluate a case and make a decision based on the merits. If a particular legal rule is outmoded or otherwise unworkable, we hope that they will at least say so, even if they ultimately conclude that they are bound by the existing precedent. But status quo bias and the endowment effect suggest this will not happen. When given a pre-existing set of legal rules, judges will be hesitant to move away from the status quo (status quo bias) and will overvalue the intrinsic worth of the existing rules (endowment effect). Because they overvalue the benefits of the current rule, they will correspondingly overestimate the costs of changing that rule.

158 See supra note 92 and accompanying text.
160 See, e.g., Russell Hardin, COLLECTIVE ACTION 82-83 (1982).
This blends into the problem of sticky default rules. As Ben-Shahar and Pottow write in the context of contract law, parties tend to be unwilling to deviate from default rules for fear of being seen as manipulative or otherwise sneaky. Similarly, a judge who deviates from the given rule might be seen as being “up to something.” Even if judges don’t have -- and aren’t perceived as having -- a sinister motive, the “stickiness” of default rules, in part because of the status quo bias, endowment effect, and so on, suggests that the judge will not deviate. Prentice & Koehler write about the “normality bias” -- that actors are seen as more blameworthy when they take unusual actions than when they stick to the tried and true. As a result, judges have a strong incentive not to deviate from tradition, because they would be seen as more blameworthy if their novel rule proved unworkable.

Framing effects and path dependence further entrench this problem. Recall that the framing effect suggests that the answer to a particular question often depends on how it is framed. Of particular importance and relevance here, the framing effect is robust even among sophisticated respondents and even when respondents believe their answers will have an effect on policy choices. And then, of course, as particular rules develop over time, path dependence suggests that they will get entrenched. A recent article by Lindquist and Cross underscores this point. The authors empirically tested the proposition that judges’ decisions reflect their policy preferences and are unconstrained by precedent. They found that precedent does in fact constrain judges’ decision-making — but only in cases that are not of first impression. In other words, once a decision is made in a case of first impression, that rule tends to stick.

Most noteworthy is that these biases often operate in tandem. Consider a legal question to which a reasonable person might answer X or Y. First-order path dependence teaches that, if both outcomes are roughly equally reasonable, there is no way to predict what a given court will do. However, if just one court chooses Y, information cascades suggest that (at least under

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certain circumstances), more and more people will start choosing Y. Over time, it might become apparent that X was the better option. But second-order path dependence predicts that we will be unlikely to choose X. This prediction is reinforced by status quo bias and the stickiness of default rules: given a particular legal entitlement (“Y”), we will be highly reluctant to move away from it. We might even imagine that some judges, in good faith, evaluate X and Y and weight the benefits of the correct rule against the costs of change. However, the endowment effect suggests that even these well-intentioned judges will overestimate the benefit of sticking with Y and overestimate, as a result, the cost of moving to X.

Our choice biases also interact with our attitudes and motives. This is perhaps most vividly illustrated by the intersection of system justification theory and status quo bias: we start out predisposed to “preferring” the status quo, and once we get accustomed to the status quo, we imbue it with a sense of legitimacy. In this telling, we are even less likely to move from Y to X, because, in addition to the incorrect assessment of cost and benefit, we are subconsciously primed to believe that X -- merely by virtue of being different -- is unjust and unfair. Similarly, the motive to cohere and the motive to simplify predict that, when an array of fact patterns come up over time, judges are more likely to recast a given case in terms of pre-existing precedent (“Y”), because doing so is simpler and creates a coherent narrative.

If these cognitive biases have explanatory power, then we might find ourselves in quite a bit of trouble. Under the current system, lower courts are supposed to take precedent at face value until altered. Moreover, stare decisis applies not only to courts holdings but also their ratios decidendi -- the reasons for their decisions. But if judges (being, as they are, human) are using cognitive shortcuts, and if these shortcuts are all skewing in the same direction, then we should be suspicious of judges’ decisions and their stated reasons for them.

About a decade ago, Eric Talley explored a partial version of my hypothesis: he analyzed whether legal doctrine could be explained as being the result of information cascades. In setting up this inquiry, he wrote,

If common law precedent is in fact a type of information cascade, it would represent the strongest refutation yet of the common law efficiency hypothesis. Indeed, it would suggest that even if judges are predisposed towards efficiency, and even if they do not face a biased selection of cases, precedents might still frequently diverge
from the most efficient legal rule. Moreover, a theory of precedential herding would force us to rethink the coherence of virtually any jurisprudential theory of precedent that conceives of the common law as a mechanism for judicial learning—be it economic or otherwise. If precedent represents a weak or impoverished learning device, then a common law system of adjudication seems unlikely to produce reliable results.}\(^{164}\)

Well, that’s the payoff. The correlated cognitive, psychological, and situational phenomena I have outlined in this section, operating in tandem, strongly undercut the typical arguments for stare decisis. We think that the received legal rules are desirable (why would we have come to these decisions if they were not?). But “survival does not imply present-day superiority to untried alternatives.”\(^{165}\) In the balance of this paper, I evaluate what implications this might have for law, respond to some criticisms of my argument, and imagine what a (jurisprudential) world might look like if stare decisis did not have the weight it does today.

### IV. SOME PREDICTIONS, AND IMPLICATIONS FOR LAW AND LEGAL THEORY

#### A. PREDICTING BIAS

At this point it is worth pausing and asking whether this theoretical argument has practical significance. Are there instances where reliance on stare decisis has produced “skewed” results? In one sense, the question is difficult to answer. For example, since *Hadley v. Baxendale*,\(^ {166}\) a party who

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\(^{164}\) Eric A. Talley, *Precedential Cascades: A Critical Appraisal*, 73 S. Cal. L. Rev. 87, 92 (1999). Talley ultimately concludes that precedent cannot be fully explained by cascades. But crucially, he reaches this conclusion because his analysis focuses exclusively on cascades and not other cognitive biases. He writes,

This does not mean, however, that considerations of [cascades] are wholly irrelevant to advance our theory of judging and judges. Indeed, cognitive biases or reputational concerns *alone* might drive judges to fall into a cascade. But if that be so, the case must be made on those terms, and not as a set of phenomena that exacerbate existing informational cascades.

*Id.* at 124. My analysis seeks precisely to make “the case . . . on those terms,” surveying a variety of cognitive and behavioral phenomena. I also respond more fully to Tulley near the end of the paper.


\(^{166}\) 9 Exch. 341 (1854).
breaks a contract is only liable for reasonably foreseeable damages, not proximately caused damages. The practice of stare decisis has entrenched this rule in our system, and it may or not be preferable to the alternatives. However, even among critics of Hadley’s rule,\textsuperscript{167} it would be hard to find some unanimity as to why Hadley was wrong, and harder still to determine if information cascades and status quo bias entrenched the rule, as opposed to a good faith belief among generations of judges that such a rule was preferable.

However, it is possible to find at least circumstantial evidence of stare decisis producing results that are, if not skewed, at least somewhat suspect. Assume that a court at time $t$ decides that, under certain circumstances, the correct legal rule is $X$. Assume further that at time $t+n_1$, another court also holds $X$. Then, at $t+n_2$, a third court holds $X$; at $t+n_3$, a fourth court holds $X$. These courts might be reaching the same result because they believe the first rule was correct, or because doing so leads to stability, or to preserve judicial legitimacy. However, the entrenchment of the legal rule may also be due to information cascades and heuristic judgments by the subsequent courts.

There are several factors that could suggest that a subsequent court is following the first court’s ratio decidendi because it is relying on stare decisis as a heuristic, rather than as a means to preserve certain ostensibly desirable goals. I predict that when the subsequent court’s decision reflects a heuristic judgment, the decision is likely to have one or more of several characteristics:

1. The subsequent court relies on the first court, even though the first court’s decision is not binding on it.
2. The subsequent court engages in relatively little legal analysis of the issue, whereas the first court engaged in extensive analysis.
3. When there is ambiguity in the law, the subsequent court resolves the ambiguity in such a way that supports the decision of the first court.
4. The subsequent court -- when the number of cases following the first court is relatively high -- justifies its decision with reference to the large number of courts that have already decided $X$.
5. The subsequent court relies relatively more on policy considerations or generalized principles of law, rather than more detailed textual or

doctrinal analysis.

When a rule of law is unsettled or still developing, I predict that several of these factors would be present in the decisions of the various *subsequent* courts, providing strong circumstantial evidence that the subsequent courts are using stare decisis as a crutch, rather than as a mode of legal reasoning that supports desirable outcomes. Of course, the list of factors is not exhaustive and the phenomenon is not limited to unsettled law. For example, when the rule of law has been settled for a relatively long period of time, the subsequent court might emphasize the destabilizing or disruptive impact that a deviation from the received rule would have.

Although the list above is not intended to be exhaustive, the factors I set out are derived from the behavioral data catalogued in the previous section. For example, in the music downloads study,\(^{168}\) songs were downloaded more often (the “subsequent court,” to use the construction above) when they were shown to be popular on a list of top downloads. If a similar phenomenon applied to judicial decision-making, I would predict that a certain rule of law would become more entrenched when it was shown to be the popular rule in other courts. Just as the Southern District of New York is not obligated to follow the rule of decision in the Eastern District of Pennsylvania, someone downloading music in Lowenstein’s study was not obligated to download the popular song. Following a trend when it is not obligatory provides strong circumstantial evidence of information cascades.

Along similar lines, system justification theory suggests that judicial decisions are entrenched because we want to believe that a legal system is fair and just. Subsequent courts might be inclined to follow earlier cases by telling the challenger that the status quo rule (made by the first court) is the fairer and more just rule. Similarly, our motives to simplify and cohere suggest that courts will be hostile to those who challenge the precedential rule, because change is potentially disruptive. Particularly in the face of ambiguity, these phenomena suggest that our reasoning is motivated to create simple and coherent narratives out of the facts before us, which in turns suggests that courts will resolve ambiguity in favor of the precedential rule. Risk aversion -- and the tendency of courts (and others) to overestimate the costs of change -- further escalates this problem.

According to the case law, lower courts are obligated to accept binding precedent at face value until altered. But the cognitive and situational phenomena canvassed above suggest that we humans will generally rely on

\(^{168}\) See supra notes 89 - 91 and accompanying text.
“precedent” – that is, we will defer to, and overvalue, existing rules and arrangements – regardless of the doctrinal edicts that compel a judge to do so in a particular case. Courts will rely on precedent, even when they are not obligated to, as a cognitive shortcut, pushing the law in directions that might be incorrect or otherwise socially undesirable.

1. Testing the Prediction I: Section 304 of Sarbanes-Oxley

In 2002, Congress enacted the Sarbanes-Oxley Act in response to the corporate scandals of the day. Among other things, the law provided for so-called “clawbacks.” Under this provision, in Section 304 of the law, a company would be able to recover certain compensation paid to its executives if malfeasance was later revealed. Specifically, the law provided that if an issuer filed a restatement because of misconduct resulting in “material noncompliance” with financial reporting requirements, then the company’s CEO and CFO would be required to reimburse the issuer for (1) bonuses and other compensation received in the twelve months following the first filing of financials subject to a restatement; and (2) any profits derived from the sale of the issuer’s securities during those twelve months.

However, Section 304 did not specify who had the right to enforce the provision. Some sections explicitly gave a company’s shareholders the right to enforce the statutory provision in question; other sections explicitly reserved enforcement authority in the Securities and Exchange Commission (“SEC”). Section 304 did neither. It was a classic “gray area.” Predictably, in the years since SOX was enacted, Section 304 has been the subject of many shareholder derivative suits. The shareholder plaintiffs have argued that Section 304 creates an implied private right of action in their favor, and the companies have argued that it does not.

175 This was the litigants’ position in all of the cases cited infra.
Eventually, the courts spoke on the question. The first case to squarely address this issue was *Neer v. Pelino*, a 2005 case from the Eastern District of Pennsylvania. *Neer* recognized that when a statute is unclear as to whether there is a private right of action, courts must conduct a four-step analysis, as the Supreme Court instructed in *Cort v. Ash*. Therefore, *Neer* analyzed the four “*Cort* factors” to determine whether there was a private right of action under Section 304. The court examined the statutory text of Section 304, the legislative history of Sarbanes-Oxley, and the relation of Section 304 to other provisions in the statute. *Neer* ultimately concluded that there was no private right of action under Section 304 and dismissed that count of plaintiffs’ complaint for failure to state a claim.

So far, so good. But statutory analysis, it turns out, has a lot in common with music downloads. Recall that in the study by Salganik et al., songs would get downloaded more often if the consumers were told that those songs were popular. Information cascades are well-documented in other contexts. What about in the law? The § 304 example shows federal district courts across the country essentially following the rule set forth in *Neer*, with little to no legal analysis of their own. Over time, the *Neer* rule has become reinforced in the case law, with subsequent courts referring to the large number of prior courts that have reached the same conclusion as *Neer*. The courts are following the leader, even though *Neer* is binding on none of these courts. Although the subsequent cases tend to recognize the statutory ambiguity, they uniformly resolve the ambiguity in a way that supports *Neer*. As a result, every subsequent case meets characteristics (1) and (3) above. I discuss the post-*Neer* cases below.

*Neer*’s analysis spanned seven pages in the official reporter. Since *Neer*, cases have disposed of the issue in just a few paragraphs, or sometimes just a sentence or two. The next major case after *Neer* (*BISYS Group, Inc.*) disposed of the issue in just two paragraphs with no substantive legal analysis. Instead, the court summarily held

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176 My case study focuses on the district courts to address this question. As of this date, only one circuit court has squarely addressed the issue. See *In re Digimarc Corp. Deriv. Litig.*, 549 F.3d 1223 (9th Cir. 2008). I discuss the district court’s ruling in *Digimarc* in this section. However, for my purposes, it is not particularly relevant that the Ninth Circuit has spoken to this question. My overall thesis explores the development of this line of case law at the district courts and, for the three-plus years between *Neer* and the Ninth Circuit’s decision, *Neer* was the first district court case. I predict that the Ninth Circuit’s decision will get cited with some frequency now, but *Neer* will almost certainly continue to be cited regularly.


179 See supra notes 89 - 91 and accompanying text.
that there is no private right of action under Section 304 of Sarbanes-Oxley, substantially for the reasons stated in Neer. The question whether creation of a private right of action under Section 304 might have been a good idea is for Congress, which alone is charged with making the close judgments and sometimes messy compromises inherent in the legislative process.  

Thus, BISYS reflects factors (2) and (5) above: relatively little legal analysis of the issue, and a reliance on policy justifications in lieu of textual or doctrinal analysis.

In Whitehall, the court laid out the Cort factors and discussed the issue more extensively than in BISYS. However, Whitehall also demonstrates the beginnings of an information cascade regarding Section 304. First, the court wrote that it “is inclined to concur with its colleagues in Neer and Bisys Group that no private right of action is available under § 304 . . . .” 

Second, although the court laid out the applicable doctrinal analysis, at every juncture, it simply deferred to Neer or BISYS. Whitehall thus reflects at least factor (2), and to a lesser extent (4) -- reference to the number of courts that have already reached a particular decision.

Kogan v. Robinson, about eight months after Neer, engaged in the most extensive analysis of any post-Neer case. However, even here, the legal

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181 The court’s comment that the issue is one for Congress is peculiar, because the Supreme Court has indicated that courts may imply private rights of action under certain circumstances. See Cort v. Ash, 422 U.S. 66 (1975). Judge Kaplan might (correctly) believe that the current Court disfavors implied rights of action and that he should therefore disregard Cort. However, “if a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower court] should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions.” Rodriguez de Quijas v. Shearson, 490 U.S. 477, 484 (1989) (emphasis added). 
183 Id. at *8.
184 See id. at *7 (“this court, too, agrees with Neer”); id. ("[t]he Neer court reached its conclusion . . . ."); id. n.13 ("[t]he Neer court observed . . . ."); id. at *8 ("[t]he Bisys Group court pointed out that . . . .").
185 Id. at *7 (noting that no court has “recognized an implied private right of action”).
analysis relies on Neer at every turn. Additionally, the court refers to “all other courts that have considered this issue[] and conclude[d] that Section 304 does not explicitly create a private remedy.” And when plaintiffs cited a Ninth Circuit case implying a right of action in favor of shareholders, the court declined to follow it, in part on policy grounds. Kogan noted that courts were more likely to imply rights of action earlier. Because courts were less likely to do so today, Kogan found the earlier Ninth Circuit case distinguishable. Thus, despite its relatively extensive analysis, Kogan reflects factors (4) and (5).

The result was the same in Digimarc. The court noted plaintiffs’ argument “that Section 304’s text, [SOX’s] statutory construction and legislative history, and the purpose underlying Section 304 all favor finding the existence of an implied private right of action.” The court responded with little legal analysis, writing instead, “Every court that has considered the issue directly has concluded that Section 304 contains no implied private right of action.” Digimarc reflects factors (2) and (4).

Goodyear disposed of the Section 304 issue in just a paragraph. Like its predecessors, the court relied on Neer. “The Court is persuaded by the well-reasoned decision in Neer v. Pelino,” Goodyear acknowledged that there was no binding precedent on the issue. Therefore, it concluded, “this Court is free to consider [Neer, Whitehall, Kogan, and Digimarc] as persuasive authority on which it bases its decision.” Of course, one might think that, “[i]n the absence of binding authority,” it is more important for a district court to analyze the legal claims anew, if only to provide a fuller record for appeal. The court’s failure to engage in such analysis underscores factor (1), in addition to reflecting factors (2) and (4).

In Pedroli v. Bartek, the court declined to imply a private right of action, pointing out that the plaintiff was “ignoring the predominant

\[\text{See id. at 1079 (citing Neer); id. (same); id. ("[a]s stated in Neer, . . . ."); id. at 1082 (citing Neer).}\]
\[\text{Id. at 1078}\]
\[\text{See id. at 1080.}\]
\[\text{In re Digimarc Corp. Deriv. Litig., No. 05-1324-HA (LEAD), 2006 WL 2345497, at *2 (D. Or. 2006).}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
holdings across the country that the Act does not create a private cause of action under § 304 . . . ."\(^{197}\)

The court disposed of the issue in just two paragraphs, concluding, “The court declines to address the issue in any more detail and believes that the cases cited conclusively mandate a dismissal of [the Section 304] Count . . . .”\(^{198}\) Pedroli also demonstrates numbers (2) and (4).

Infosonics reflects factors (2) and especially (3).\(^{199}\) First, the court defers to Neer and Kogan, addressing the issue in just two paragraphs. Second, it notes that Congress could have been explicit about creating a private right, just as it was in Section 306. Of course, it is just as true that if Congress wanted to foreclose a private right, it could have done so explicitly, just as it did in Section 303. The court thus resolves the statute’s ambiguity in favor of the earlier, non-binding courts. This underscores factor (3).

The Diebold case disposed of the § 304 claim in just one paragraph, with no legal reasoning at all, writing:

Every court that has considered whether SOX § 304 provides a private right of action has answered that question in the negative. [citing Neer, BISYS, Kogan, and Goodyear.] This court agrees, and finds that SOX § 304 does not create an implied private right of action.\(^{200}\)


\(^{198}\) Id.

\(^{199}\) In re Infosonics Corp. Deriv. Litig., No. 06cv1336 BTM(WMc), 2007 WL 2572276, at *8-*9 (S.D. Cal. Sept. 4, 2007).

\(^{200}\) In re Diebold Deriv. Litig., Nos. 5:06CV0233, 5:06CV0418, 2008 WL 564824, at *2 (N.D. Ohio Feb. 29, 2008).
Unsurprisingly, Diebold reflects factors (2) and (4) above. However, it is interesting to note that Diebold, decided in 2008, gave no special weight to Goodyear, decided in 2007 by the same court. In theory, horizontal stare decisis requires a court to adhere to its prior decisions. Therefore, Diebold could have disposed of the issue by writing, “Until and unless the Sixth Circuit instructs otherwise, this court is obligated to follow its prior decisions. Accordingly, there is no private right of action under Section 304, as stated in Goodyear.” The fact that Diebold gives no special weight to Goodyear (mentioning it only at the end of a string-cite) gives additional support for the conclusion that Diebold’s conclusion is based on a heuristic judgment, rather than bona fide legal analysis.

iBasis recognized the tension between Secton 303, 304, and 306. But that court also deferred to “all other courts that have had the occasion to address the issue directly” and “found that Congress did not create a private right of action for purposes of enforcing Section 304 of SOX.” The court went on to cite Goodyear, Kogan, Whitehall, BISYS, and Neer and was “persuaded by . . . precedent from other courts that have directly and thoughtfully considered the issue . . . .”

The iBasis decision is interesting on two levels. First, it reflects factors (2) and (4). However, it goes further. iBasis not only cites the cases above but also credits the “direct[] and thoughtful[] consideration” those cases gave to “the issue” of whether SOX § 304 contains an implied private right of action. This reference is striking because, as discussed above, almost none of the cited cases engage in “direct[] and thoughtful[] consideration” of the issue. Instead, most of the cases discuss the issue briefly, with little or no legal analysis, deferring almost categorically to Neer.

At this point, it is worth reiterating Posner and Sunstein’s argument:

If two states have adopted a law, or if two state courts have made some innovation, a third may do so, not because of any kind of independent judgment, but because it is following its predecessors. And if three states have made the same decision, a cascade might be

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203 Id.
204 Id. at 225.
205 Id.
forming. The problem is that subsequent states might assume that decisions have been made independently, even though most have been following the crowd.  

The cases discussed in the Section 304 example demonstrate, to varying degrees, all of the features that I predict would be present when later courts are following an earlier court out of cognitive bias. The case study provides strong support for the hypothesis that, at least sometimes, courts defer to prior decisions because doing so is quick and easy -- not because doing so leads to the best results.

2. Testing the Prediction II: The First and Fourth Amendments

In one sense, heuristic judgments should be less common at the Supreme Court. The court has the luxury of deciding which cases it will hear, so it can manage its resources in a way that other courts cannot. If heuristics are a way of dealing with scarce cognitive (judicial) resources, then we should expect to find such biases less prevalent when resources are greater. Similarly, Supreme Court Justices (and law clerks) may, aware of the importance of their work, be especially careful not to take shortcuts, cognitive or otherwise.

But at the same time, other considerations suggest that the Supreme Court might be more prone to biases and heuristics. First, the Court is final; it is bound by no other court, as reflected in Justice Jackson’s famous quote, “We are not final because we are infallible; we are infallible because we are final.” A lower court might rationalize its reliance on precedent on the basis of the doctrinal rules that obligate it to reach a particular result. The Supreme Court, answerable (at least formally) to no institution but itself, might actually be more susceptible to bias because it is not bound by any sort of frequent check.

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207 Two interesting questions arise. First, would every single case have come out the opposite way if Neer had come out the other way? Second, if one Circuit Court holds that there is a private right of action, will district courts in other circuits follow it (the first/only circuit court to speak on the issue), or the “weight of authority” among the majority of district courts? The second is an open question. However, for reasons that are beyond the scope of this Article, the behavioral literature suggests that other courts might not have followed Neer in my counterfactual, because of the strong situational pressures that drive corporate law to generally favor managers over shareholders, especially in derivative suits. See Ron Chen and Jon Hanson, The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law, 103 Mich. L. Rev. 1 (2004).
Second, as Richard Posner points out, at least in constitutional cases, the Supreme Court is not bound by any “law” at all. Posner writes:

[t]he Supreme Court, when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature’s. It cannot abdicate that power, for there is nothing on which to draw to decide constitutional cases of any novelty other than discretionary judgment. To such cases the constitutional text and history, and the pronouncements in past opinions, do not speak clearly. Such cases occupy a broad open area where the conventional legal materials of decision run out and the Justices, deprived of those crutches, have to make a discretionary call.

Constitutional cases in the open area are aptly regarded as “political” because the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms. They can be decided only on the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms.208

My assertion here is not that the Supreme Court’s position of finality renders it incapable of making “bias-free” judgments. I am making a more modest point: although the Court’s position situates it different from the lower courts, it is still susceptible to heuristics and biases.

Anuj Desai’s recent series of articles about the early history of the United States Postal Service are a good example of such judgments. Desai argues that the evolution of certain First and Fourth Amendment constitutional doctrines can only be properly understood with the statutory history of the USPS in mind. When early post office cases came to the Court, they were properly decided with reference to the statutes that Congress had enacted governing the post office. However, those cases implicated broader questions of free expression and privacy. Later, when those constitutional questions implicating free expression and privacy arose, the Supreme Court followed its earlier post office decisions -- even though those decisions were based on the unique institutional context of the post office and were not squarely on all fours with the constitutional cases.

In *Wiretapping before the Wires* and *Transformation of Statutes into Constitutional Law*, Desai argues that legislative decisions made hundreds of years ago, during the formation of the U.S. Post Office helped shape constitutional doctrines. Specifically, the judge-made doctrines regarding the First Amendment “right to receive” ideas, First Amendment restrictions on government subsidies, and Fourth Amendment privacy of correspondence all had their origins in Post Office policy.

Professor Desai outlines the process by which constitutional law can follow legislative choices thusly:

1. Congress passes a statute;
2. the statutory provision gives an institution certain attributes;
3. over time, social practice embeds those attributes into the institution; and
4. the courts then take those attributes and write them into constitutional law.

Desai chronicles how this process manifested itself in connection with the Post Office. First, the legislature embedded certain republican principles (a right to privacy in the mails, a right to receive ideas) into the institution. Over the years, these principles became ingrained into societal expectations about how the post office should operate. Eventually, the Supreme Court held that these principles were constitutionally required. The Supreme Court effectively raised Postal Office statutes to the level of Constitutional law.

This story starts in the 1770s, when revolution was brewing in the colonies. The existing British postal system had no notion of privacy of correspondence. Indeed, the British government regularly opened citizens’ mail in order to gather intelligence on “conspiracies.” Though it was officially illegal to open mail without a warrant, warrants were issued secretly and could often contain hundreds of names. As one historian stated, “secrecy made legality unimportant.”

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212 *Id.* at 560.

213 *Id.* at 561.
Not only was confidentiality of the mail compromised, those who controlled the postal networks could also control what was allowed through the networks. Postmasters would exploit their position to block competing newspaper publishers from using the postal service. As tensions rose between the British and the colonists, the nature of this blocking became political.\textsuperscript{214}

This regular opening of private correspondence posed a special problem for American rebels, who had to ensure privacy of correspondence to carry on their plans for the Revolution. Further, their inability to use the postal service to distribute their newspapers discouraged the American rebels from communicating their ideas to a larger audience. In response, they adopted an alternate mail system, the “constitutional post,” established by William Goddard, a Philadelphia newspaperman. Goddard realized the importance of the postal network for securely transmitting private information as well as for transmitting news and ideas to the populace. In his proposal to establish the “constitutional post,” he wrote, “It is not only our letters that are liable to be stopped and opened by a ministerial mandate, and their contents construed into treasonable conspiracies, but our newspapers, those necessary and important alarms in time of publick danger, may be rendered of little consequence for want of circulation.”\textsuperscript{215} His goals coincided with those of the American revolutionaries – freedom to express ideas without fear of being accused of treason.\textsuperscript{216}

In 1782, the Continental Congress passed a postal ordinance that codified this desire for freedom of correspondence. The ordinance prohibited postal officials from opening the mail without “an express warrant.” The ordinance also called for “moderate rates” for the mailing of newspapers.\textsuperscript{217} After the ratification of the Constitution, Congress passed the Post Office Act of 1792.\textsuperscript{218} A provision for privacy of correspondence passed without controversy. However, debate arose around two issues involving newspapers. One issue revolved around whether to allow all newspapers to be circulated or whether to selectively admit certain newspapers. The second issue was what rate should be charged for mailing newspapers. Eventually, Congress voted against selective admission, based on fears that the policy would be used by the postmasters to discriminate against publications they disagreed with. As for rates, the legislature

\textsuperscript{214} Desai, Transformation, 58 Hastings L.J. at 680.
\textsuperscript{215} Desai, Wiretapping, 60 Stan L. Rev. at 564.
\textsuperscript{216} Id. at 564.
\textsuperscript{217} Desai, Transformation, 58 Hastings L.J. at 683.
\textsuperscript{218} Id. at 689.
decided on reduced rates for newspaper subscribers, mostly subsidized by letter writers. This newspaper subsidy was based on the idea that in a republic, it was the government’s responsibility to ensure citizens have access to information about public affairs. The passage of this act set in motion important policies that would shape the post office as an institution, and eventually shape constitutional law.\footnote{Id. at 693.}

Another consequence of the 1792 Post Office Act was the formation of a functional monopoly of the Post Office. This happened because Congress chose to retain the power to designate postal routes. This power gave representatives a chance to bring back tangible benefits to their district in the form of a post office and mail service -- what we might today call congressional “pork.” Naturally, this led to the rapid proliferation of postal routes, even to areas with very small populations. This ubiquity of mail routes made the post office the most effective conveyor of information across long distances, leading to a “practical dependence of the public upon the [P]ost [O]ffice” as Justice Holmes would later state.\footnote{Id. at 694.} This effective monopoly had later implications for constitutional law.

Desai emphasizes that privacy of correspondence, as well as subsidized rates for newspapers both developed independently of the Constitution. These republican principles had already been written into the 1782 Postal Ordinance, and the Constitution was ratified in 1789. Thus, the principles of privacy of correspondence and newspaper subsidies pre-dated the Constitution.

How then did this minor postal act find its way into constitutional law? Tracking Desai, I address each principle separately -- the Fourth Amendment principle of privacy of correspondence, First Amendment restrictions on government subsidies, and the First Amendment “right to receive” ideas.

Privacy of correspondence was first addressed in \textit{Ex Parte Jackson}.\footnote{Desai, \textit{Wiretapping}, 60 Stan L. Rev. at 569.} Though the case is primarily seen today through the lens of its First Amendment implications, Desai points out that this is the first case in which the Court acknowledged a right to privacy of correspondence. The fact pattern of the case had nothing to do with the opening of sealed letters -- the petitioner, Orlando Jackson, had been convicted for mailing information about a lottery. The case mainly revolved around whether the government
had the right to prevent certain materials deemed “unmailable” from being mailed. The Court eventually upheld the statute and Jackson’s conviction. However, they added in dictum that the Court could not enforce the statute by opening sealed letters.222 It is this dictum that first addresses the issue of privacy of correspondence:

[A] distinction is to be made between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined.223

The Court further stated, “The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.”224 Desai claims that the Court “effectively characterized a letter passing through the mail system as the sender’s ‘papers’ for Fourth Amendment purposes.”225 The principle of privacy of mail correspondence was thus constitutionalized. “Justice Field saw in the Fourth Amendment not what the constitutional drafters had put there, but instead what postal policymakers had incorporated into the structure of the post office.”226 This judicial interpretation based on the post office is an example of path dependence and risk aversion -- the traditions of an institution becoming reinforced over time because people prefer the less risky path of status quo. This principle of privacy of correspondence as applied to mail was simply announced as a self-evident truth, even though no mention of it had appeared in the Constitution, and even though the notion itself was new in the 18th century.

*Milwaukee Leader* and *Hannegan v. Esquire* provide examples of how the Supreme Court made postal subsidies for newspapers a matter of constitutional law.227 The *Milwaukee Leader* case involved a Socialist newspaper that was denied subsidized mailing rates, because it was deemed “unmailable.” The Court held that the newspaper could be denied the subsidized rate.228 In his dissent, Justice Brandeis characterized the denial of the subsidy as akin to a penalty or fine. He further stated that such

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222 Id. at 575.
223 Id. at 575.
224 Id. at 575.
225 Id. at 575.
226 Id. at 577.
228 Id. at 707.
discrimination was “effective censorship.” 229 Desai points out that Brandeis’ reasoning was closely entwined with particular attributes about the post office itself. Specifically, the monopoly that the Post Office held over long distance communication, and the subsidies provided to other publications, would likely cause the newspaper to lose money and fold. Brandeis’s reasoning is dependent on this institutional context -- and tends to reflect the operation of some of the cognitive biases described above. For example, it is not necessarily the case that denying a subsidy to this newspaper is effective censorship; it might be distributed through means other than the post office. Brandeis’s reliance on the institutional characteristics to make a broader point, unrelated to the institution, reflect a motive to simplify.

_Hannegan v. Esquire_ 230 focused on a similar question: whether the Postmaster General had the power to determine what was eligible for subsidized second-class mailing rates. In this case, the Postmaster had determined that _Esquire_ magazine was not entitled to second class rates because it was deemed sexually explicit. This time, the court ruled that the Postmaster did not have the power to decide which publications were eligible for subsidized mailings. The court stated that to give the Postmaster that power would amount to censorship, and to give a government official the power to decide “[w]hat is good literature, what has educational value, what is refined public information, [or] what is good art . . . smacks of an ideology foreign to our system.” 231 Desai points out that such an assertion, taken out of the context of the Post Office, is simply wrong. For example, public university professors and public school teachers are hired specifically for the purpose of deciding what is good literature or has educational value. Again, the Court relies on the institutional context of the Post Office to explain its reasoning, even though its conclusions are not related to the Post Office.

It is interesting to think about what the court might decide if Congress had decided not to subsidize newspapers, or to charge newspapers according to the distance the paper traveled. Would the issue then become one of whether subscribers living too far away are being denied their free speech rights? My point -- as is Desai’s -- is not that these decisions were substantively incorrect; I am not making a normative claim about whether newspapers should be subsidized. Rather, my point is that this reasoning reveals a tendency to use existing _non-binding_ rules to justify subsequent decisions. The notion that newspapers had a right to subsidized postage was

229 _Id._ at 709.
230 _Id._ at 712.
231 _Id._ at 713.
not mentioned in the Constitution. Yet somewhere along the line it became a conventional truth. The court even referred to “our tradition” of providing newspaper subsidies.\footnote{\textit{Id}. at 713.}

The Post Office’s monopoly over long distance communication makes its way into \textit{Lamont v. Postmaster General}.\footnote{\textit{Id}. at 715.} By the 1920s, the Post Office’s monopoly over long distance communication was such an entrenched reality that the reasoning of the case was shaped around that fact. Though the Court did not allude much to the Post Office, one can see their dependence on that specific institution by looking at how the court dealt with the “right to receive” in a different case, \textit{Board of Education v. Pico}.\footnote{\textit{Id}. at 719.} In that case, the attempt to apply the “right to receive” to books in a public school library did not succeed. The analogy failed because most of the Justices felt the institutional differences between post office and public school were too great.\footnote{\textit{Id}. at 719.} The notion that the post office constituted a monopoly played a large part in the development of the “right to receive” doctrine. According to then-Justice Rehnquist, if a person could not receive materials through the mail, it was the equivalent of a “complete denial of access to the ideas sought,”\footnote{\textit{Id}. at 722.} because the post office constituted an effective monopoly. Desai points out that Rehnquist makes an overstatement – a person could indeed receive ideas through other avenues (something that is probably even more true today). Rehnquist’s reasoning reveals a motive to simplify, a preference for the simpler of two explanations. The inability to receive materials in the mail only constituted a “complete denial” in the context of the monopolistic post office. For example, if the Post Office Act of 1792 had instead ceded power to the Executive to designate postal routes, and as a result our postal service had been much smaller, the “right to receive” may very well not have developed, at least in the context of receiving mail. Thus, the reasoning behind the “right to receive” cannot be divorced from its institutional underpinnings.

So what is happening here? How do ideas that were novel in the eighteenth century, having nothing to do with constitutional law, become a matter of constitutional law in the twentieth? Let us return to the late eighteenth century, when the new American republicans had recently escaped the clutches of British rule. A framing effect may have affected
their decision making when it came to post office policy. Recall that a framing effect is observed when a decision maker’s choices are affected by the way those choices are described. Faced with a decision to either allow all newspapers to be published or only some newspapers to be published, the decision makers chose to allow all newspapers to be published. Barring some newspapers from being published was what the British had done, and the new republicans wanted to avoid anything that smacked of British rule. Each decision was viable – proponents of selective admission argued that newspapers overburdened the mail system, which was “by no means an idle concern.” Those who supported universal admission argued that those in power could discriminate against those who were not, an idea borne out by the history of British blocking of newspapers. When the issue was framed as “what the British did” versus “what the British didn’t do”, the decision makers were bound to choose the positively framed choice -- “what the British didn’t do.”

This new idea, that all newspapers should be published regardless of content (what we might today call “network neutrality”) was accepted as “tradition” by the 20th century. This may have been path dependence at work: our current perception of political and economic outcomes determined by the timing in which the earlier decision was made. So, over time, this initial decision to universally accept all newspapers (itself the result of a framing effect), became post office tradition.

Finally, once this idea had become entrenched post office tradition, a series of heuristics may have further entrenched it into constitutional law. Using the typology above, I argue that these cases reflect factors (1), because the post office cases were clearly not binding on the subsequent constitutional cases. To an extent, the cases also reflect factor (2), because the prior legal analysis regarding the post office effectively got “imported” into the constitutional cases. The motives to simplify and cohere are also at play. If the court had started anew with the constitutional cases (not an unreasonable proposition, since the cases were, after all, ones of first impression), arguably similar cases could have spawned at least two and possibly more lines of doctrinal development. Adopting the post office line of doctrine in constitutional cases led to caselaw that was not only simpler (fewer lines of doctrine) but also more coherent (a single story to explain disparate phenomena). Over time, path dependence led us to apply these early precedents in cases that have nothing to with their origin. For example, the Ninth Circuit has recently held that an individual has a privacy interest in the contents of a text message, but not the number he was sending

237 Id. at 690.
the text message to. This derives from our long-standing privacy interest in the content of a telephone call, but not the number we are dialing. The telephone rule, in turn, has its origins in the post office statutes -- under which, as early as the eighteenth century, a citizen could expect that the content of his letters would be private, but not that the addressee would be kept private.

Again, I am not arguing that these decisions are incorrect or even that they would not have come about in the absence of the early post office cases. In fact Desai repeatedly, and explicitly, says that our existing set of doctrinal rules could very well have come about even in the absence of the post office statutes and cases. This underscores my overall theme in this article: the fact that stare decisis reflects cognitive bias, in theory or in practice, does not necessarily mean that the decisions reached are incorrect. It merely means that we should be particularly vigilant about our reliance on prior decisions.

3. Testing the Prediction III: The Global War on Terror

Over the course of this article, I have used the terms “precedent” and “stare decisis” mostly interchangeably, though doctrinally, there is a slight difference between the two (that is not relevant here). However, the idea of precedent, loosely defined, affects decision-making in all sorts of contexts beyond the law. Although this Article takes aim at the doctrine of precedent in the law as commonly understood, it has broader application as well. As Schauer points out,

Appeals to precedent do not reside exclusively in courts of law. Forms of argument that may be concentrated in the legal system are rarely isolated there, and the argument from precedent is a prime example of the nonexclusivity of what used to be called “legal reasoning.” . . . In countless instances, out of law as well as in, the

238 See Quon v. Arch Wireless Operating Co., 529 F.3d 892 (9th Cir. 2008). One has no expectation of privacy in the to/from number of a text message because he has no such expectation in the to/from e-mail address in an e-mail message. And that is so because one has a privacy interest in his telephone conversations but not the numbers he has dialed. And that is so because -- you know where this is going -- you have a privacy interest in your letters, but not the address on the outside. See id. at 904-05.

239 See, e.g., Desai, Transformation, 58 HASTING L.J. at 702 (“Although I do argue that the Post Office’s characteristics were embedded into the fabric of constitutional doctrine, I am not arguing that we would not have these two doctrines today without their origins in postal policy.”).

240 See supra note 33 and accompanying text.
fact that something was done before provides, by itself, a reason for doing it that way again.\(^{241}\)

The implications of my argument are reflected in a series of decisions regarding the Global War on Terror (GWOT). Shortly after the terrorist attacks of September 11, 2001, the United States began detaining suspected terrorists at Guantanamo Bay, Cuba.\(^{242}\) Two related issues arose: first, the permissible legal limits of the interrogation techniques the federal government could use against the detainees, and second, what if any legal process the detainees would have access to, including rights to habeas corpus or similar procedures.

It is no exaggeration to say that the GWOT is unprecedented in its nature and scope. This unprecedented situation provides a good test of the arguments I have advanced in this Article.

In the first example, the government had to determine what interrogation techniques the military and intelligence officers could use on the detainees. By way of federal criminal law and international agreements, the United States was bound not to use “torture.”\(^{243}\) John Yoo, then at the Department of Justice, was given the unenviable task of defining what exactly constituted torture.

Yoo has since been reviled by many for his callous formulation of what constituted torture. Yoo explained that one of the elements of torture was “severe pain or suffering” and that, “to constitute torture[,] ‘severe pain’ must rise to . . . the level that would ordinarily be associated with a physical condition or injury sufficiently serious that it would result in death, organ failure, or serious impairment of body functions.”\(^{244}\) Far from reflecting Yoo’s heartlessness, however, the phrase reflects his susceptibility to the heuristics that affect all of us.

As Yoo pointed out in an interview a few years after he authored the

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\(^{243}\) See 18 U.S.C. § 2441 (prohibiting war crimes); id. § 2340A (prohibiting torture); U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, 1465 U.N.T.S. 113 (Apr. 18, 1988).

\(^{244}\) See Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, *Military Interrogation of Alien Unlawful Combatants Held Outside the United States*, at 38-39 (March 14, 2003).
2009] STARE DECISIS IS COGNITIVE ERROR [Vol. __: 59

now-infamous memo, the question he faced in defining "severe pain or suffering" was, "has Congress ever used this phrase anywhere before?"²⁴⁵ Yoo found that Congress had in fact defined the phrase, in a statute that Yoo "th[ought] was about health care."²⁴⁶ But there was more; the interviewer pressed Yoo on the issue:

Esquire [Magazine interviewer]: John, you’re a very engaging guy, I like you -- I can’t picture you writing that phrase “organ failure or death.”

Yoo: It’s the phrase Congress used. The main criticism, which is certainly fair, is that statute is so different from this one, how can you borrow the language of one and include it in the other. On the other hand, that’s the closest you can get to any definition of that phrase at all.²⁴⁷

The section of the memo that analyzes the meaning of “severe pain or suffering” is relatively short, less than a page of single-spaced text.²⁴⁸ The analysis begins by noting that simple “pain or suffering” would be insufficient to constitute torture; Section 2340 requires that such pain or suffering be “severe.”²⁴⁹ The statute, however, does not define “severe.” Yoo looked in two places to determine the definition of “severe . . . pain or suffering.” First, the memo lays out the dictionary definitions of severe.²⁵⁰ Second, the memo lays out the meaning of severe pain as used in another Congressional statute.²⁵¹

Congress’s use of the phrase “severe pain” elsewhere in the U. S. Code can shed more light on its meaning. See, e.g., West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991) (“[W]e construe [a statutory term] to contain that permissible meaning which fits most logically and, comfortably into the body of both previously and subsequently enacted law.”).²⁵²

²⁴⁶ Id.
²⁴⁷ Id. (emphasis added).
²⁴⁸ Yoo, supra note 244, at 38-39.
²⁴⁹ Id. at 38 (citing 18 U.S.C. § 2340 (emphasis added)).
²⁵⁰ Id. at 38.
²⁵¹ Id.
²⁵² Id.
Yoo notes that in “statutes defining an emergency medical condition for the purpose of providing health benefits,” 253 “severe pain” is treated “as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment. Such damage must rise to the level of death, organ failure, or the permanent, impairment of a significant body function.” 254

There are two points I want to make regarding Yoo’s analysis. First, as the case cited by Yoo itself notes, a statutory term is to be given a uniform definition across contexts only when doing so “fits . . . logically.” 255 Arguably, using a definition relating emergency medical services in the torture context does not fit logically.

Second, and more to the point, Yoo’s conclusion reflects heuristic judgments. Recall the five factors laid out at the beginning of this Section. Yoo’s conclusion reflects at least factors (1), (2), and (3). Obviously, Yoo’s memo is not a judicial decision, but the same principles apply. The analysis reflects factor (1) because Yoo is relying on prior analysis that is not binding in the “instant case.” In other words, the language Yoo relies on is not from any case involving torture, or even criminal law. There may have been good reasons for doing so, 256 but the fact remains that what Yoo relied on was not directly on point.

Yoo’s memo also reflects factor (2), a relative lack of legal analysis. The background on Section 2340 (and 2340A) and the discussion of the specific intent requirement are about twice as long as the section on “severe physical pain.” 257 About half of the section on physical pain simply recites the dictionary definition of the word “severe,” and the only legal analysis on point is the discussion of the (arguably irrelevant) statutes.

Finally, Yoo’s memo reflects factor (3), resolving ambiguity in favor of the extant law. It is not unreasonable to think that the “unprecedented” attacks of September 11 would result in (and might even require) a legal analysis that did not rely on pre-existing doctrines and extant, but unrelated,

253 Id.
254 Id.
256 See Yoo, supra note 244, at 38 (“Although the other statutes address a substantially different subject from section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain.”). Note, however, that Yoo does not explain why the other statutes are helpful; the sole reason appears to be that the other statute happens to use the phrase “severe pain.”
257 See id. at 34-38.
Stare Decisis Is Cognitive Error

legal categories.

These kinds of judgments, however, are precisely what my hypothesis would predict. Relying on “precedent” applies to all kinds of legal reasoning, not just judicial opinions. The motive to cohere and the motive to simplify are at work; the same standard is applied across context because doing so simplifies the realm of legal doctrine and brings coherence to an ambiguous area of torture law. The availability heuristic is also prominent: Yoo’s memo relies on the readily available formulation even though it did not, even by his own admission, bear on the case at hand.

The GWOT provides another occasion to examine the Supreme Court’s use of arguments about precedent. First, there mere fact that something has not previously been done is an argumentative trump, even at the Supreme Court. Second, mode of reasoning applied even in cases raising questions about enemy combatants’ due process rights. In Rumsfeld v. Padilla, Chief Justice Rhenquist, writing for the Court, responded to Justice Stevens’s dissent by writing, “the dissent cannot cite a single case in which we have deviated from the longstanding rule we reaffirm today.” In both cases, the absence of a case on point was a crucial, if not dispositive, argument (in both cases, the point was so important that the relevant words were italicized). Yet (just as with Yoo’s memos) one might think that the GWOT might require novel legal or analytical approach.

Again, my point is not that Yoo’s analysis, or the Justices’ arguments, were incorrect or that the law of torture should not have bright-line rules (which, by Yoo’s account, was his goal in writing the memo). Instead, my point is only that even in a war that presented “unprecedented dangers,” a critical juncture of the issue presented -- how much physical pain is so severe as to constitute torture -- relies on quite ordinary, and to some extent cursory, legal analysis. Although the importance of the law and

261 See supra note 245.
262 George W. Bush, State of the Union Address to Congress and the Nation (Jan. 30, 2002).
2009] STARE DECISIS IS COGNITIVE ERROR [Vol. __: 62

policy issues at stake prompted careful legal analysis, it was impossible to completely eliminate the effect of cognitive bias on the legal conclusions. This underscores my overall point. It’s not only difficult to overcome these cognitive biases; because the biases operate subconsciously, it is often impossible.

B. TRUTH OR STABILITY?263

Earlier, I quoted Adrian Vermeule and pointed out that “The key point is not that judges are likely to get things wrong; it is that when they do get things wrong, they are likely to err in systematic rather than random ways.”264 Vermeule’s point applies to my analysis as well. The key point is not just that we humans have certain cognitive biases; it is that when our decisions are skewed, they are likely to be skewed in systematic rather than in random ways.265

Then the question is, “So what?” Maybe our expressed preferences -- as humans, as citizens, as lawyers -- is unduly weighted toward the past. Is

263 Thanks to Zachary Clopton for highlighting this issue.
264 Vermeule, supra note 82.
265 This is not to suggest that there are not countervailing cognitive biases. For example, some combination of optimism bias and overconfidence may lead individuals to shun existing arrangements in favor of their own, idiosyncratic views. See, e.g., Antonio E. Bernardo & Ivo Welch, On the Evolution of Overconfidence and Entrepreneurs, Yale Cowles Foundation Working Paper No. 1307, available at http://ssrn.com/papers=275516 (last visited February 21, 2009) (on file with author). Bernardo and Welch argue that the overconfident -- those who, presumably, are less likely to exhibit the biases I describe in Part III -- are more likely to be entrepreneurs and risk-takers. There are two responses. First, the literature demonstrates far more “backward-looking” biases than “forward-looking” biases. Second, the people Bernardo and Welch identify are, by definition, the exception. My paper, on the other hand, is aimed at the characteristics that are reflected in most people’s behavior, most of the time.

I should note (as may already be apparent to some readers!) that my analysis is not perfect. One hundred percent of the population is not biased toward the status quo; some people may buck the trend in the face of even the most forceful cascade. Just because most people will demonstrate some quality most of the time does not mean all people will do so all of the time. However, as Hanson and Yosifon write in The Situation,

2009] STARE DECISIS IS COGNITIVE ERROR [Vol. __: 63

this really problematic? Maybe the law is “wrong” as measured against some idealized notion of humans’ preferences (if such an ideal could even be extrapolated), but this may not pose any practical problems. But if the law is not meant to embody some intrinsic truth, but instead is merely meant to be stable and predictable, then this problem seems illusory.

For example, maybe the penalty for a particular crime should be 15 years in prison, not 20 as under the status quo. But if everyone is aware of the 20 year penalty, and if this penalty is relatively unlikely to change over time, then the law is at least stable and people can act accordingly. Conversely, acute awareness of the possibility of bias might require judges to constantly re-evaluate legal rules, putting the rules in a state of flux and making it unpredictable and unstable.

However, I argue that this problem is overblown. Even if law is merely meant to foster stability, and even if we are completely agnostic about the substantive content of the law, my analysis poses problems with the doctrine of stare decisis whether we are concerned about truth, stability, or both.

C. PROBLEMS IN BOTH CASES, AND SOME SOLUTIONS

Imagine that you have a gun that, due to some mechanical error, always fires slightly (but somewhat unpredictably) to the left of where it is aimed. Now imagine that the error is brought to your attention. What do you do? Broadly speaking, there are three options. First, you might decide that your gun’s aim is off enough that you buy a new gun, one that does not have this error. Second, you might decide that the slight unpredictability is not reason enough to buy a new gun, so you will just aim slightly to the right from now on and correct the gun’s bias. Finally, you might decide that you generally want to shoot to the left anyway, and that therefore you won’t change much at all. The gun’s “leftness” is a good thing to be aware of, but since it generally gets you where you want to wind up, it is not going to affect your actions.

This analogy maps onto the argument made in this Article. The evidence put forth in Part III suggests that our court decisions will tend, for situational and psychological reasons, to be rooted in history, tradition, and precedent. The theory I infer predicts that we will choose these existing arrangements, not because they are the best of all possible worlds, but merely because they exist. In other words, our jurisprudential gun will always shoot slightly to the left. However, the evidence does not provide
perfect predictive power. Precedent is sometimes disregarded and cases do get overruled. Thus, although our decisions are rooted in the past, it is not possible to predict with complete certainty how firm the roots are and when they will be broken.

And so, broadly speaking, there are three alternatives. I term these the strong case, the middle case, and the weaker case. In the strong case, stare decisis is fundamentally unworkable, so the only option is to buy a new gun. In the middle case, stare decisis is seen as a “thumb on the scale” for the cold hand of the past. Aware of this information, we might aim slightly to the right, by lessening but not eliminating our dependence on stare decisis. In the weaker case, the theory offers very little. It sheds some light on reasons why our jurisprudential gun aims to the left, but if we want a system that is resistant to change, then we may simply decide that the cognitive biases outlined above do not change the systemic calculus (and may, in fact, provide reasons why the current system is preferable). I discuss each of these possibilities in turn.

1. The Strong Case

The strongest form of the argument is that the legal system reflects cognitive shortcomings and nothing more, so we should scrap stare decisis and look to another way to adjudicate cases. Under the strong case, judges should not follow precedent other than as a last resort.

In the strongest form of the argument, our cognitive biases and heuristics make reliance on precedent unreliable. Therefore, courts should essentially engage in “de novo review” every time. A court would not be barred from following precedent -- such a rule would be patently absurd -- but there would be a strong presumption against doing so. On appellate review, a court would critically examine the lower court’s citation to precedent. The appellate court would be especially vigilant to monitor whether the district court was following precedent as a heuristic, for example, by evaluating the district court’s decision as measured against the five factors outlined in the previous part. For example, if and when the \textit{iBasis} case were appealed to the First Circuit, the First Circuit should be wary of the decision below because there are strong grounds to think that the \textit{iBasis} court relied on precedent -- and non-biding precedent at that -- as a heuristic.\footnote{This may not even prove much, because legal questions are reviewed \textit{de novo} anyway. \textit{See, e.g.}, \textit{United States v. Lara-Ramirez}, 519 F.3d 76, 83 (1st Cir. 2008).} Moreover, in the strongest form of the argument, not only would the practice of stare decisis reflect cognitive bias, but the doctrine
STARE DECISIS IS COGNITIVE ERROR

itself could be seen as arising as a reflection of bias -- and nothing more.

2. The Middle Case

The “middle ground” of this argument considers stare decisis (history, precedent, stability) one set of factors among many to consider when deciding legal rules. Under this "middle ground," precedent should generally be respected, but the burden of proof is on the one who wants to maintain the status quo.

The middle ground can be illustrated with an example. Consider a legal dispute and a given set of facts. Assume further that the correct answer to this legal question is X, another reasonable answer is Y, and an unreasonable answer is Z. Under the current system of stare decisis, if an appeals court concludes Z, that conclusion is binding on all lower courts and on itself.267 Under the “middle ground” that I propose here, a subsequent court might reason as follows: An earlier court concluded Z. However, after reviewing the basis for that conclusion, we conclude that it was incorrect. Therefore, we conclude X. Under this regime, a court would have the flexibility to depart from precedent and review the rule anew. In other words, the subsequent court would review the earlier case out of a concern that it would follow the prior rule as a heuristic rather than because of the informational content contained in the rule.

However, once the subsequent court concluded X or Y, that rule would be binding on subsequent courts. In other words, so long as the precedential rule was reasonable, it would be binding; courts would only be free to revisit precedent if they were convinced the earlier rule was incorrect.

3. The Weaker Case

The weaker case is that all my theory offers is a “tweak.” Under the existing doctrine, for example, the Supreme Court will not overrule its earlier precedent unless it has become demonstrably erroneous and unworkable.268 Under the weakest version of the theory, this Article highlights one phenomenon that should go into the calculus when Justices are determining whether a given precedent is demonstrably erroneous or

267 See, e.g., United States v. Humphrey, 287 F.3d 422, 451-52 (6th Cir.2002) (explaining that a given Sixth Circuit panel is bound to follow precedential authority from another panel even if current panel is inclined to disagree with prior decision).
unworkable. At the lower court level, if judges could think of any plausible reason for sticking with the existing rule, then they should do it. Under the weakest version of my argument, lower courts will almost never be justified in deviating from the existing rule. The only possible exception might be in, for example, a SOX Section 304 case in the District of Massachusetts or some other district that decided the private right of action question “late in the game,” so to speak. If, after an analysis like mine, a court was convinced to a high degree of probability that the existing rule was the result of a cascade, the court might be justified in deviating from the rule. Even under this conception, though, a lower court would probably never be justified in refusing to follow a higher court’s rule.

D. AN IMPORTANT QUALIFICATION

Imagine that I want to know if it will rain tomorrow. You come to me and say, “I believe it will rain tomorrow.” I take this piece of information and add it to the available data I have. Eventually, I use your information when I decide whether or not it will rain tomorrow (and presumably, your comment makes me somewhat more likely to think it will rain tomorrow).

But now imagine that I asked you how you know it will rain tomorrow, and you say, “It came to me in a dream.” You didn’t check the weather report, or look at your barometer, or collect any sort of data. Now, my faith in the epistemic basis of your claim is shaken, and your claim carries less weight than it otherwise would. However, and this is key, the fact that your information came to you in a dream does not bear at all on whether it will actually rain tomorrow. Maybe it will, for reasons related to your dream or not, but the sensible thing for me to do (ex ante) is to discount your assertion.

So, too, with stare decisis. It may be that stare decisis is desirable for a variety of reasons. However, the social psychological evidence suggests that we believe in stare decisis because it “came to us in a dream.” Of course I don’t mean that literally, but just as in the weather example above, the epistemic basis of our faith in stare decisis is called into question. The mere presence of cognitive bias can never tell us that our decision is wrong. Biases can only tell us that the reasons we think our decision was right are unreliable.

269 Thanks to Adrian Vermeule for this example, which I adopt from his telling almost verbatim (to the best of my recollection).
Another point worth noting: although I advocate a decreased reliance on precedent in our system, I do not argue that judges should be oblivious to rulings in earlier, like cases. At its inception, the doctrine of stare decisis did most of its work in making the law “common” -- that is, in making legal rules standard across the various English counties. Certainly, that is a desirable goal for any legal system, and (at least to some extent) advocates defend stare decisis on similar grounds today, arguing that it makes the law more stable, predictable, and efficient.\textsuperscript{270}

Today, the “information sharing” function of stare decisis is significantly less important. With every published decision, and many unpublished decisions, available on Westlaw or Lexis within a matter of months (at most), search costs are dramatically lower. Judges are in a position to signal to each other in a way that they were not in eight hundred or a thousand years ago.

Moreover, judges can (and should) learn from each other through this information-sharing. Even in the strongest case, procedurally rejecting stare decisis does not mean that judges are required to ignore other (correct) decisions. It does not even mean that judges should go out of their way to avoid the prior results. It merely means that stare decisis carries no normative weight, whereas in today’s jurisprudential system it is almost always dispositive.

This leads to another point: even in the strongest case, even if the doctrine of stare decisis is eliminated altogether, judges will still rely on precedent. Suppose that my analysis is correct. (After all, that would be the only reason to decrease our reliance on precedent.) The phenomena catalogued in Part III suggest that, even in the absence of a formal mechanism by which judges are obliged to rely on prior decisions, they will do so anyway. In other words, even if the doctrine of stare decisis were to be eliminated in one fell swoop, my hypothesis implies that judges will still be relying on prior decisions in some manner. Thus, we would not completely lose the benefits that stare decisis provides.

E. WILL THE WORLD COME TO AN END? (NO.)

Stare decisis is defended on a variety of grounds.\textsuperscript{271} If the hypothesis I advocate takes hold, and prior judicial decisions have diminished sway -- even in like cases -- will the legal system fall apart at the seams? If stare

\textsuperscript{270} See supra Part II.B.
\textsuperscript{271} See supra Part II.
STARE DECISIS IS COGNITIVE ERROR

2009

decisis “controls the caprice of judges by requiring them to suppose that all similar future cases will be decided according to their instant decision,”272 a weaker role for precedent might encourage the caprice of judges. If stare decisis is “prudential” and “pragmatic,”273 a weaker role for precedent might lead to imprudent and impractical outcomes. If stare decisis enables efficiency, a weaker role for precedent might throw parties’ prospective planning into disarray and harm our country’s economic prospects.

I do not dwell on these possible objections to my argument because I find them to be a canard. First, as others have pointed out, the increasing number of unpublished dispositions at the court of appeals level and oral decisions at the district court level means that a large number of cases are taken out of the “stare decisis database,” so to speak. Second, as Nelson has thoroughly explained, a decreased reliance on stare decisis by no means suggests that chaos will reign. Third, it is unlikely that a decreased reliance on stare decisis will undermine efficiency goals, as it is unclear whether the current system furthers those goals in the first place.

First, courts frequently, and by some accounts increasingly, rely on unpublished dispositions (at the appeals level) or oral dispositions (at the trial level).274 Even though some of these decisions may be available via online databases, litigants are instructed not to cite them.275 Schmier and Schmier argue that the “abandonment” of stare decisis -- through the use of unpublished dispositions -- is detrimental to the democratic process.276 Whatever the merits of their argument, it is clear that if 93% of cases are decided without a published opinion, and where the practice has not had a tremendous destabilizing, delegitimizing, or efficiency-impeding effect on the law, a decreased reliance on stare decisis will probably not wreak havoc on the rule of law.

Second, and at a deeper level, a decreased reliance on stare decisis does not mean that courts should decide cases based on a whim or whatever else strikes their fancy. In his article, Stare Decisis and Demonstrably Erroneous Precedent, Caleb Nelson argues (for a variety of reasons unrelated to my paper) that stare decisis should not carry the almost-
dispositive weight that it does under the current regime.\textsuperscript{277} But Nelson does not argue -- and neither do I -- that judges should be entirely free to make any decision they want in a given case. Instead, Nelson adapts the administrative law model of \textit{Chevron}\textsuperscript{278} deference.\textsuperscript{279} Under \textit{Chevron}, a reviewing court will defer to an agency’s interpretation of a statute so long as that interpretation is “permissible,” even if the court would have chosen a different interpretation in the first instance. A reviewing court is not bound by the agency’s interpretation if it is “impermissible.”\textsuperscript{280}

I adapt Nelson’s analysis, that a similar framework should apply to stare decisis. A lower court should be permitted to disagree with the stare-decisis-given rule (to an extent that varies depending on which version of my theory is adopted), but its discretion would be limited, essentially by a reasonableness side constraint. Under such a system, erroneous or otherwise unworkable precedents would be more likely to be abandoned. The reviewing court should then uphold the lower court unless it is “impermissible,” i.e., if it has no reasonable basis in law or fact -- or if it relied on stare decisis as a heuristic.

Nelson argues persuasively that a weaker version of stare decisis is likely to lead to a net benefit. Among other things, the weaker version of stare decisis will lead to more overruling of prior decisions and, presumably, the law becoming more “correct” as a result. But this benefit is not without cost; as courts engage in more overruling, the law could become more uncertain and potentially unstable. Yet it is not necessarily clear that the current system, with a stronger form of stare decisis, is free from such uncertainty. After all, when legal questions are clear, individuals would probably not litigate them; the mere fact of litigation often signals that we are in a gray area. In those cases, the law would be no more uncertain under a weaker version of stare decisis. And when litigants do bring a question where the correct answer is clear (or well established, or easy to ascertain) there is a very good chance that judges will adhere to that correct answer, under any system of stare decisis, strong or weak.\textsuperscript{281} As Nelson points out, even under a weaker regime, the law is more likely to move toward correct decisions, \textit{even if} subsequent courts are as likely to be error-prone as their predecessors.\textsuperscript{282}

\textsuperscript{279} See Nelson, \textit{supra} note 277 at 5-8.
\textsuperscript{280} See \textit{Chevron}, 467 U.S. at 842-45.
\textsuperscript{281} See generally Nelson, \textit{supra} note 277, at 54-60.
\textsuperscript{282} See \textit{id.} at 59-60.
This kind of a system is not -- if you will excuse the pun -- unprecedented. Appellate courts routinely affirm lower court rulings with which they might, writing on a blank slate, decide differently. For example, courts will affirm an agency’s adjudication so long as it is supported by substantial evidence, even if the court would have reached a different conclusion. When there is an appeal following trial, all inferences are drawn in favor of the jury’s verdict; the jury’s verdict is affirmed so long as there is any evidence that supports it. Issues not properly preserved for appeal are routinely reviewed for “plain error,” meaning that a court’s conclusion is upheld unless there is no reasonable basis for the lower court’s ruling. In short, there are already a wide range of cases where an appeals court will uphold a decision it might disagree with, so long as it has some basis in law or fact.

Now imagine that a case presents certain facts. One judge might reach one conclusion, X, that is reasonable under the circumstances. Some time later, on similar facts, another judge might conclude Y. If the standard of review is plain error, an appeals court -- the same appeals court -- could very well permit both decisions to stand under the status quo. This is not much different from the result that would obtain under a system with a weaker reliance on precedent.

Third, it is highly unlikely that a system with decreased reliance on stare decisis will undermine efficiency goals (bracketing the question of whether economic efficiency should be the sole goal of a system of justice at all). For example, Stake wrote in a recent article that the demise of the fee tail estate demonstrates the efficiency of the common law: the fee tail, by holding that only first-born sons could inherit property, was inefficient; the common law ultimately abolished the fee tail, suggesting that the common law moves toward efficiency. However, as Hirsch points out in a persuasive reply, the common law is not a natural system that arose of its own accord; “it is also, through and through, a participatory system. Human participation cannot but leave its indelible stamp.” That stamp, he argues, includes phenomenon such as the stickiness of legal rules, status quo bias, and the availability heuristic. In other words, these psychological phenomena undercut the common-law-as-efficiency hypothesis, even in a

285 Id. at 430-31.
very limited context (fees tails and other perpetuities).

Along these lines, no less a titan in the law and economics field than Judge Richard Posner (and co-authors) looked at the Economic Loss Rule in tort law, the doctrine which holds one cannot sue for economic loss without physical injury under certain circumstances. The doctrine arose around the 1960s and 70s, and its application gained ground in various states over time. Yet after conducting a detailed empirical analysis, Posner and his coauthors conclude that the law did not converge on any given point, evolved inconsistently, and under almost any interpretation, did not converge on efficiency. Of course, this does not mean that no legal rules ever converge on efficiency. It does, however, mean that any critique of my argument that suggest that my proposal will throw into whack an already-efficient system is, at best, incomplete, and at worst, flat wrong.

Finally, it is worth noting that a critique against my paper’s premise contains the seeds of its own response. To put it another way: I assume at the outset of this Article that stare decisis has a constraining effect on judge and that effect pushes decisions toward the past. Reasoning from that premise, and on the basis of psychological evidence, I conclude that stare decisis should have a diminished role in our jurisprudential system.

However, some people argue that stare decisis already does very little work to constrain judges because (1) judges are simply enacting their own political preferences, (2) there is so much prior case law, encompassing so many sets of facts, that “precedent” can be used to justify virtually any position, or (3) both.\(^\text{287}\) I find this argument to be unpersuasive. The overwhelming majority of cases are simply not politically charged, so that


political preferences do not even enter the equation. Indeed, even at the Supreme Court, unanimity is not uncommon: of the seventy-five full opinions published in the last term of the Supreme Court, one-third of them had no dissenting opinion.\footnote{See, e.g., The Supreme Court -- The Statistics, 122 Harv. L. Rev. 516, 521 (2008) (noting that roughly one-third of Supreme Court opinions have no dissent and that Justices dissent relatively rarely). In the most recent term, only twelve cases were decided by a 5-4 vote. \textit{Id.} at 522.}

However, this critique carries within it the basis of my response. If judges are already unconstrained by precedent, then the parade of horribles that will supposedly ensue should already be happening. The legal realists’ theories acknowledge, implicitly or explicitly, that the fact that legal decisions reflect political preferences does not, \textit{ipso facto}, throw the law into flux because most decisions are not political. Similarly, I acknowledge (explicitly) that the fact that we should decrease reliance on stare decisis will not, \textit{ipso facto}, throw the law into flux.

There is one final point I want to make. In his 1999 article, Talley concludes that precedent cannot be explained as an information cascade. First, he writes that cascades are unlikely to occur because of the possibility of appellate review.\footnote{Eric A. Talley, Precedential Cascades: A Critical Appraisal, 73 S. Cal. L. Rev. 87 (1999).} However, as Guthrie and George point out, the overwhelming majority of cases are affirmed on appeal, suggesting that appellate review is not as robust as Talley assumes. Second, he argues that cascades are unlikely because we don’t know \textit{what} courts did but \textit{why} they did it, because of the written opinions. However, as the Sarbanes-Oxley example demonstrates, courts often dispose of a case with little or written explanation, suggesting that the value of a written opinion is not dispositive in determining if a cascade is at work. Third, Talley suggests that cascades are unlikely because judges are heterogeneous and have competing considerations. However, in this line of argument, Talley underestimates the strong institutional ethos (not to mention the cognitive and behavioral factors) that weigh strongly in favor of following precedent.

But Talley is right -- it is difficult to identify a cascade and it is difficult to identify cognitive bias at work. However, I have tried to identify some factors that could help in making that determination. In conjunction, these factors give us at least more persuasive -- even if not conclusive -- evidence. For example, in the context of the unconscionability doctrine, Talley says that it is hard to identify a cascade. However, he focuses on only one factor
STARE DECISIS IS COGNITIVE ERROR

(following the decision of a non-binding court). I have identified other factors. Of course, these are not infallible or exhaustive. They do, however, move us closer to knowing when bias is at work.

It is true that appellate review might halt or reverse a district court cascade. But if the Supreme Court hears very few cases (it does), and if the Courts of Appeal affirm the overwhelming majority of cases (they do), then a district court cascade such as the one I identified earlier bodes poorly for defenders of stare decisis.

V. CONCLUSION: A WAY OUT

For a very long time -- varying a bit by whom you ask -- the practice of stare decisis has been the cornerstone of Anglo-American jurisprudence. We are taught that present-day courts should follow the lead of their predecessors because (1) the earlier courts are more likely to have reached the correct answer; (2) sticking with the status quo rule fosters stability, predictability, and efficiency; and (3) the practice furthers judicial legitimacy.

Yet as scores of studies from a variety of disciplines show, we are not rational actors coldly picking the best solution to a given legal problem. We take mental shortcuts and deviate from rationality in ways we aren’t even aware of. We are primed to prefer existing social and political systems, and we place an undue weight on tradition and the status quo. If we see others making a given decision, we tend to follow that decision, believing that others know best even when our “private stock of reason” tells us otherwise. In short, our decisions are biased and the biases are correlated.

If our biases were random, we might take some comfort knowing that they might all cancel out. But they are not random. We are cognitively primed to subconsciously prefer precedent -- and then we built a legal system that requires courts to follow precedent. My argument in this paper is not that we should switch to a civil law system or that stare decisis should be abandoned. I do argue that we should look at the practice with a critical eye.

Hanson and Yosifon write that, in developing legal theory, we ought to begin with descriptions of real human actors and work from there. Similarly, the law would be more honest, more accurate -- and, yes, more just -- if we cast that same critical eye on judicial decision-making.